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No. 2824

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

LADD & TILTON BANK, a Corporation,

Plaintiff in Error,

vs.

LEWIS A. HICKS COMPANY, a Corporation,

Defendant in Error.

Writ of Error to the United States District Court
for the District of Oregon.

TRANSCRIPT OF RECORD.


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Court of Appeals

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No. 2324

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vs.

LEWIS A. HICKS COMPANY, a Corporation,
Defendant in Error.

**Names and Addresses of Attorneys
upon this Writ:**

For the Plaintiff in Error:

Wood, Montague & Hunt,
Spaulding Bldg., Portland, Ore.

For the Defendant in Error:

Chamberlain, Thomas & Kraemer,
Chamber Commerce Bldg., Portland, Ore.

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 25 day of June, 1912,
there was duly filed in the District Court of the
United States for the District of Oregon, a Com-
plaint, in words and figures as follows, to wit:

[Complaint.]

*In the District Court of the United States in and for the
District of Oregon.*

LADD & TILTON BANK, a corporation,
Plaintiff,

vs.

LEWIS A. HICKS COMPANY, a corporation,
Defendant.

Comes now the above named plaintiff, Ladd &
Tilton Bank, and for cause of action against the above
named defendant complains and alleges as follows:

I.

That plaintiff is a corporation duly incorporated,
organized and existing under and by virtue of the
laws of the State of Oregon, with its office of prin-
cipal place of business in the City of Portland, County
of Multnomah and State of Oregon.

II.

That the defendant, Lewis A. Hicks Company, is a
corporation duly incorporated and existing under and
by virtue of the laws of the State of Nevada.

III.

That the matter or sum in controversy exceeds, ex-

clusive of interest and costs, the sum of three thousand dollars and is to wit, three thousand six hundred dollars (\$3,600.00).

IV.

That heretofore the above named defendant, Lewis A. Hicks Company, entered into a contract with School District No. 1 of Multnomah County, Oregon, wherein said contract the said Lewis A. Hicks Company agreed to construct, build and complete a certain school house within the City of Portland, County of Multnomah and State of Oregon, and within School District No. 1 aforesaid, which said school house is popularly known as the new Lincoln High School.

V.

That thereafter the Lewis A. Hicks Company, the above named defendant, entered into a certain contract with Sullivan Fireproof Partition Co., a corporation, wherein and whereby the Sullivan Fireproof Partition Co. contracted to do certain work in connection with the said new Lincoln High School aforesaid. The contract price to be paid the Sullivan Fireproof Partition Co. upon the completion of its contract with the Lewis A. Hicks Company as aforesaid was seventeen thousand five hundred dollars (\$17,500.00).

VI.

That heretofore the Sullivan Fireproof Partition Co. became indebted to Ladd & Tilton Bank, the within named plaintiff, and in order to secure the repayment to said Ladd & Tilton Bank of all sums

which were due or might thereafter become due to the said Ladd & Tilton Bank from the Sullivan Fireproof Partition Co. the Sullivan Fireproof Partition Co. did, on the 18th day of December, 1911, make, execute and deliver unto said Ladd & Tilton Bank an assignment of all moneys that might become due from the Lewis A. Hicks Company to the Sullivan Fireproof Partition Co., which said assignment was duly accepted in writing by the Lewis A. Hicks Company. Said assignment and acceptance thereof is in words and figures as follows, to wit:

“Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,

Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this city. This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION CO.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres.
and Sec'y.

Accepted,

LEWIS A. HICKS COMPANY,

By George Wagner, Mgn.”

VII.

That thereafter, pursuant to the terms of said assignment, the Lewis A. Hicks Company paid unto Ladd & Tilton Bank all moneys which were due from time to time on account of said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company as aforesaid. That in order to facilitate the completion of the contract and to accommodate the Sullivan Fireproof Partition Co. the said Ladd & Tilton Bank agreed to reimburse itself for all indebtedness due it from the Sullivan Fireproof Partition Co. from the last moneys due from Lewis A. Hicks Company on account of said contract as aforesaid, and in pursuance thereof the said Ladd & Tilton Bank, upon payment to it by Lewis A. Hicks Company of various sums due from time to time under said contract, did turn over all of said moneys unto the Sullivan Fireproof Partition Co.

VIII.

That heretofore the Sullivan Fireproof Partition Co. completed its contract with the Lewis A. Hicks Company and on April 3, 1912, the Lewis A. Hicks Company notified the Sullivan Fireproof Partition Co. and Ladd & Tilton Bank that on or about May 1, 1912, there would be due on account of said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company the balance of said contract price aforesaid, to wit, the sum of forty-three hundred dollars (\$4300.00), of which said sum the Lewis A. Hicks Company was willing to pay seven

hundred dollars (\$700.00) on said date, to wit, April 3, 1912, and would pay the balance on May 1, 1912: the said notification being in words and figures as follows, to wit:

“Apr. 3rd, 1912.

Sullivan Fireproof Partition Co.,
City.

Gentlemen:

As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY,

By Fred A. Katz.”

FK:KT

IX.

That after the said assignment dated December 18, 1911, had been duly accepted by the Lewis A. Hicks Company and after the said Lewis A. Hicks Company had notified the Sullivan Fireproof Partition Co. and Ladd & Tilton Bank of the balance due under said contract and named the date when the same would be paid on account of said contract, Ladd & Tilton Bank in reliance upon the terms of said notification dated April 3, 1912, released unto the said Sullivan Fireproof Partition Company seven hundred dollars

(\$700.00) of the balance due under said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company aforesaid.

X.

That the indebtedness of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank has not been and is not now repaid and that heretofore Ladd & Tilton Bank has made demand upon the Lewis A. Hicks Company for the payment of thirty-six hundred dollars (\$3600.00), the same being the balance of the money due to the said Ladd & Tilton Bank by virtue of the assignment of the Sullivan Fireproof Partition Co to Ladd & Tilton Bank as herein set out, the said money being due on account of the contract between the Lewis A. Hicks Company and the Sullivan Fireproof Partition Co. as aforesaid, and the said Lewis A. Hicks Company refused and now refuses to pay the same.

XI.

That there is now due Ladd & Tilton Bank by virtue of the assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank and as herein set out, the full sum of thirty-six hundred dollars (\$3600.00).

WHEREFORE, Ladd & Tilton Bank prays judgment against Lewis A. Hicks Company in the sum of thirty-six hundred dollars (\$3600.00), together with interest thereon at the rate of six per cent per annum from the first day of May, 1912, and for its costs and disbursements incurred herein.

WOOD, MONTAGUE & HUNT,
Attorneys for Ladd & Tilton Bank.

[Endorsed]: Complaint. Filed June 21, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of September, 1912, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer.]

(Title.)

Now comes the above named defendant, and for answer to the complaint in the above entitled action, admits, denies and alleges as follows:

I.

Admits Paragraph I, II, III, IV, and V of Plaintiff's complaint.

II.

Admits the execution of the assignment described in Paragraph VI of said complaint, but denies any knowledge or information sufficient to form a belief as to the remaining portion of said Paragraph.

III.

Admits that thereafter, pursuant to the terms of said assignment, the Lewis A. Hicks Company paid unto Ladd & Tilton Bank, all moneys which were due from time to time on account of said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company as aforesaid, but denies any knowledge or information sufficient to form a belief as to the remainder of Paragraph VII of said complaint.

IV.

Admits that theretofore the Sullivan Fireproof Partition Co. completed its contract with the Lewis A. Hicks Company, and admits the execution of the notification described in Paragraph VIII of said complaint, but denies any knowledge or information sufficient to form a belief as to the remainder of said Paragraph VIII.

V.

Admits that Ladd & Tilton Bank paid the sum of Seven Hundred (\$700.00) Dollars referred to in Paragraph IX of said complaint, but denies any knowledge or information sufficient to form a belief as to the remainder of said Paragraph.

VI.

Denies any knowledge or information sufficient to form a belief as to whether the indebtedness of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank has not been, or is not now, repaid; admits that heretofore Ladd & Tilton Bank has made demand upon the Lewis A. Hicks Company for the payment of Thirty-six Hundred (\$3600.00) Dollars, and that the Lewis A. Hicks Company has refused and now refuses to pay the same, but denies all the remaining portion of Paragraph X of said complaint.

VII.

Denies Paragraph XI of said Complaint.

For a further and separate answer and defense to said complaint, defendant alleges:

I.

That plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal office or place of business in the City of Portland therein.

II.

That the defendant, Lewis A. Hicks Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Nevada, and as such lawfully doing business in the State of Oregon.

III.

That the Sullivan Fireproof Partition Co. is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, and as such lawfully doing business in the State of Oregon.

IV.

That School District No. 1 of Multnomah County, Oregon, is a municipal corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon.

V.

That the Pacific Coast Casualty Co. is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, and as such lawfully doing business in the State of Oregon.

VI.

That on or about the day of January, 1911,

the defendant, Lewis A. Hicks Company, entered into an agreement with School District No. 1 of Multnomah County, Oregon, for the construction of a school building known as the new Lincoln High School in the City of Portland, County of Multnomah, State of Oregon, and that upon the demand of said School District No. 1 and in compliance with the laws of the State of Oregon, as set forth in Paragraph 6266 of Lord's Oregon Laws, the defendant, Lewis A. Hicks Company, in connection with said contract, executed its bond as principal in favor of said School District No. 1, with the Pacific Coast Casualty Co. as surety thereon, of which bond the following is a copy:

“KNOW ALL MEN BY THESE PRESENTS: That we, Lewis A. Hicks Co., as Principal, and Pacific Coast Casualty Company, a corporation organized and existing under and by virtue of the Laws of the State of California, and authorized and empowered under the laws of the State of Oregon to become surety on bonds and undertakings in the State of Oregon, as surety, are held and firmly bound unto School District No. 1 of Multnomah County, Oregon, of Portland, Oregon, in the penal sum of One Hundred Sixty Thousand (\$160,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of January, A. D. 1911.

The condition of the above obligation is such that, whereas, the above bounden principal, Lewis A. Hicks Co., did on the day of January, 1911, enter into a contract with the said School District No. 1 of Multnomah County, Oregon, to furnish all the materials and perform all the work for the complete construction, with the exception of the heating and ventilation, plumbing, electric wiring and fixtures, finishing hardware, plastering, painting, glazing and linoleum flooring of the whole basement and part of building above first floor shown on plans between Market, Mill, Park Streets and Red Line of the New Lincoln High School, as called for in contract, all to be shown on the drawings and described in the specifications prepared by Whitehouse & Fouilhoux, Architects, which drawings, specifications and contracts are referred to and made a part hereof as fully as if set forth at length herein.

NOW, THEREFORE, if the said contractor shall well and faithfully perform all the covenants, conditions and provisions in said contract, plans and specifications, and shall pay all claims or liens for labor, work and material on account of all sub-contractors, material men, laborers and mechanics furnishing labor or material under said contract and all claims for damages against the owner on account of personal injury to any persons working on or about said structure, then this obligation shall be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Principal and

Surety have caused these presents to be signed by duly authorized officers, and the corporate seals to be attached hereto, this 20th day of January, A. D. 1911.

LEWIS A. HICKS CO.

By Lewis A. Hicks, President.

Amounts correct,

(Sg.) R. H. Thomas, Clerk.

PACIFIC COAST CASUALTY COMPANY,

By Marshall A. Frank, Attorney in Fact.

Form approved:

(Sg.) J. V. Beach,

H. C. Campbell,

Judiciary Committee.

VII.

That thereafter and on or about the 29th day of April, 1911, the defendant entered into a contract with J. D. Sullivan, as sub-contractor, in the matter of the construction of a portion of said new Lincoln High School Building, wherein and whereby the said J. D. Sullivan contracted to furnish the necessary labor and material for the construction of the part of the building so contracted by him to be constructed, and that afterward and on or about the 3rd day of November, 1911, the said J. D. Sullivan duly assigned to said Sullivan Fireproof Partition Co., all of his interest in his said contract, and that thereafter the said Sullivan Fireproof Partition Co. was recognized as a sub-contractor under said contract by the defendant, and as the other party to said contract, and said Sullivan Fireproof Partition Co. entered upon the per-

formance of the work specified in said contract, and accepted the terms and conditions thereof.

VIII.

That the said Sullivan Fireproof Partition Co. in said contract agreed to pay promptly, as they became due, all sums incurred for any work or labor done, or materials furnished, upon said building in connection with said contract, and that said contract provides that in case of any default on the part of the Sullivan Fireproof Partition Co. to pay any such sums, the defendant shall have the right to pay such sums, together with any additional sums the payment of which is necessitated by such default of said Sullivan Fireproof Partition Co., either for costs, Attorneys fees, or otherwise, and that all sums so paid by the defendant should be repaid by the said Sullivan Fireproof Partition Co., and that the defendant might with-hold any money due the Sullivan Fireproof Partition Co. until such indebtedness is repaid.

IX.

That on the 18th day of December, 1911, the said Sullivan Fireproof Partition Co. gave an order upon defendant in favor of plaintiff, of which the following is a copy, being the same order set forth in Paragraph VI of plaintiff's complaint, to-wit:

Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,

Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all

monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this City.

This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION CO.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres.

and Sec'y.

Accepted,

LEWIS A. HICKS COMPANY,

by George Wagner, Mgr.

X.

That the plaintiff received said order from said Sullivan Fireproof Partition Co. with full knowledge of the obligation of the said Sullivan Fireproof Partition Co. to defendant to pay all sums incurred for all work or labor done, or materials furnished in connection with said contract, and that said order was given, as shown upon its face, subject to the condition that it was so given subject to the payment by said Sullivan Fireproof Partition Co. for all work or labor done, or materials furnished upon said building in connection with said contract, and that said order itself gave notice to plaintiff of all the terms and conditions of said contract, and that the same was received by plaintiff subject to all the conditions thereof.

XI.

That thereafter the Sullivan Fireproof Partition Co. entered upon the performance of the work specified in its said contract with defendant, and thereafter completed the same, and that the defendant has paid, by and with the consent and through the medium of the plaintiff, Ladd & Tilton Bank, the full amount of contract price and extras provided for in said contract, excepting the sum of Thirty-five Hundred (\$3500.00) Dollars, and that on the 16th day of May, 1912, there was unpaid, account of said contract, by defendant, the sum of Thirty-five Hundred (\$3500.00) Dollars.

XII.

That thereafter, and on or about the day of May, 1912, defendant was served with a garnishment in an action brought by Roebblings Sons Co. against the Sullivan Fireproof Partition Co. in the Justice's Court for the District of Portland, County of Multnomah, State of Oregon, wherein the sum of Two Hundred Fourteen and Ninety-nine Hundredths (\$214.99) Dollars was garnished in the hands of defendant as being due and owing to the Sullivan Fireproof Partition Co., and that thereafter a judgment was duly made and entered in said Justice's Court against said Sullivan Fireproof Partition Co. in said amount and against defendant, and that the defendant thereupon paid said sum in satisfaction of said judgment; that the claim of said Roebblings Sons Co. which culminated in said judgment, grew out of the

furnishing of materials to said Sullivan Fireproof Partition Co. in connection with the contract of said Sullivan Fireproof Partition Co. with defendant, and that there remains at this time unpaid by defendant, account of said contract with said Sullivan Fireproof Partition Co., the sum of Three Thousand Two Hundred Seventy-seven and Ninety-six Hundredths (\$3,277.96) Dollars.

XIII.

That the following named persons and corporations performed labor and furnished materials to the Sullivan Fireproof Partition Co. to be used and which was used in the matter of the partial construction of said building by said Sullivan Fireproof Partition Co. under and by virtue of its contract with defendant, and that there is now unpaid and owing to the said persons and corporations by the said Sullivan Fireproof Partition Co., on account thereof, the amounts set opposite their respective names, to-wit:

Acme Cement Plaster Co.	\$ 836.55
Atlas Mixed Mortar Co.	121.30
Portland Quarry Co.	134.00
Columbia Contract Co.	114.08
Columbia Hardware Co.	30.22
East Side Transfer Co.	75.65
E. Hippeley	32.35
Northwest Door Co.	51.05
Oregon Transfer Co.	72.75
Portland Machinery Co.	47.85

Portland Railway, Light and Power Co.	52.90
George B. Rate	13.75
Union Oil Company	78.25
Western Lime & Plaster Co.	1285.91
Wright and Branch	1400.00
United States Steel Product Co.....	150.00

making a total of Four Thousand Four Hundred
Ninety-six and Sixty-one Hundredths (\$4,496.61)
Dollars.

XIV.

That the Sullivan Fireproof Partition Co. is insolvent, and is unable to pay to said persons and corporations the said amount of Four Thousand Four Hundred Ninety-six and Sixty-one Hundredths (\$4,496.61) Dollars, or any part thereof, and that the said persons and corporations are claiming from the defendant under its bond so executed to School District No. 1 of Multnomah County, Oregon, the said aggregate sum of Four Thousand Four Hundred Ninety-six and Sixty-one Hundredths (\$4,496.61) Dollars, and that a portion of said corporations have already instituted an action against the defendant upon said bond and that defendant is liable for and will be compelled to pay to said persons and corporations the said sum of \$4,496.61.

XV.

That owing to the failure of said Sullivan Fireproof Partition Co. to pay to said persons and corporations the said sum of Four Thousand Four Hundred Ninety-six and Sixty-one Hundredths (\$4,496.61) Dollars,

the defendant has paid all moneys due, or to become due, to said Sullivan Fireproof Partition Co., and that there was not at the commencement of the above entitled action, nor is there now anything due, owing or payable by the defendant to said Sullivan Fireproof Partition Co., and that consequently there is nothing due, owing or payable from defendant to plaintiff by virtue of said order.

WHEREFORE, defendant prays for a judgment of the above entitled court, dismissing the above entitled action, and for a judgment against plaintiff for its costs and disbursements herein.

CHAMBERLAIN, THOMAS & KRAEMER,
and LESTER W. HUMPHREYS,

Attorneys for Defendant.

[Endorsed]: Answer. Filed Sept. 14, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of December, 1912, there was duly filed in said Court, a Second Amended Reply, in words and figures as follows, to wit:

[Second Amended Reply.]

(Title.)

Comes now the above named plaintiff and for a second amended reply to the answer filed by the above named defendant, denies, admits and alleges as follows:

I.

For a reply unto paragraph I of the further and

separate answer and defense plaintiff admits the same.

II.

For a reply unto paragraph II of the further and separate answer and defense plaintiff admits the same.

III.

For a reply unto paragraph III of the further and separate answer and defense plaintiff admits the same.

IV.

For a reply unto paragraph IV of the further and separate answer and defense plaintiff admits the same.

V.

For a reply unto paragraph V of the further and separate answer and defense plaintiff admits the same.

VI.

For a reply unto paragraph VI of the further and separate answer and defense plaintiff admits that the defendant entered into an agreement with School District No. 1 of Multnomah County, Oregon, for the construction of a High School Building to be known as the New Lincoln High School, and admits that in connection with said contract the above named defendant executed its bond as principal in favor of said School District No. 1, with the Pacific Coast Casualty Company as surety thereon, but denies any knowledge or information as to whether or not the bond

set forth in said Paragraph VI is a true copy of said bond and the whole thereof, and denies any knowledge or information as to whether or not said bond was executed pursuant to the laws of the State of Oregon as required by Section 6266 of Lord's Oregon Code or of any other section of said Code.

VII.

For a reply unto paragraph VII of the further and separate answer and defense plaintiff admits that on or about the 29th day of April, 1911, the defendant entered into a contract with J. D. Sullivan as sub-contractor, for the construction of a portion of the New Lincoln High School, and admits that said contract was, on or about the 3rd day of November, 1911, duly assigned to the Sullivan Fireproof Partition Co., and admits that the Sullivan Fireproof Partition Co. entered upon the performance of the work specified in said contract, but denies any knowledge or information sufficient to form a belief as to the other allegations in said paragraph of said further and separate answer set forth.

VIII.

For a reply unto paragraph VIII of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief as to the allegations thereof and therefore denies the same.

IX.

For a reply unto paragraph IX of the further and separate answer and defense plaintiff admits the same.

X.

For a reply unto paragraph X of the further and separate answer and defense plaintiff denies the same.

XI.

For a reply unto paragraph XI of the further and separate answer and defense plaintiff denies that the defendant, by the consent and through the medium of Ladd & Tilton Bank, has paid all of the money due under the said contract entered into with the Sullivan Fireproof Partition Co. excepting the sum of thirty-five hundred dollars (\$3500.) and this plaintiff denies that the sum of thirty-five hundred dollars was, on the 16th day of May, 1912, the balance due and remaining unpaid on account of said contract.

XII.

For a reply unto paragraph XII of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

XIII.

For a reply unto paragraph XIII of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

XIV.

For a reply unto paragraph XIV of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief

as to the facts therein alleged and therefore denies the same.

XV.

For a reply unto paragraph XV of the further and separate answer and defense plaintiff denies the same.

And for a further and separate reply unto the answer filed by the defendant herein and by way of estoppel, this plaintiff alleges as follows:

I.

Plaintiff refers to its complaint filed herein and refers to each and all of the allegations thereof and makes the same a part of this further and separate reply.

II.

That at the time the Sullivan Fireproof Partition Co. borrowed money from the plaintiff herein as set forth in the complaint filed herein, the Sullivan Fireproof Partition Co. made, executed and delivered, for a valuable consideration, unto Ladd & Tilton Bank, an assignment of all the funds due and owing or to become due and owing to it on account of said contract from Lewis A. Hicks Company, which said assignment is in words and figures as follows, to wit:

“Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,

Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the under-

signed for the partition work in the New Lincoln High School in this city. This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION CO.

J. D. SULLIVAN, Pres.

A. C. SULLIVAN, V. Pres.

and Sec'y.

Accepted,

LEWIS A. HICKS COMPANY

By George Wagner."

which said assignment was duly accepted by the Lewis A. Hicks Company, and pursuant to the terms thereof said Lewis A. Hicks Company did thereafter pay unto the Ladd & Tilton Bank, as assignee, all the money due under and by virtue of said contract and assignment as aforesaid, save and except thirty-six hundred dollars (\$3600.) as in said complaint set forth.

III.

That heretofore and on or about April 3, 1912, Lewis A. Hicks Company made and delivered the following notice:

"Apr. 3rd, 1912.

Sullivan Fireproof Partition Co.,
City.

Gentlemen:

As your work has been completed on the Lincoln

High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY.

FK:KT

By Fred A. Katz."

That said notification of April 3, 1912, as above set forth, was made and given by the Lewis A. Hicks Company after and subsequent to the time when the Sullivan Fireproof Partition Co. had performed and completed its said contract with the Lewis A. Hicks Company as aforesaid, and after the work done under the said contract as aforesaid had been accepted by the Lewis A. Hicks Company, and after all the money due under said contract aforesaid was due and owing from Lewis A. Hicks Company by virtue thereof; that said notification bearing date of on or about April 3, 1912, was made and given by the Lewis A. Hicks Company with full knowledge, or with opportunity of full knowledge, of all the facts relative to said assignment, notice, sub-contract and the work done and acceptance thereof, and was made and given by the said Lewis A. Hicks Company with the intention that the same should be relied upon by the Sullivan Fireproof Partition Co. and the Ladd & Tilton Bank. That Ladd & Tilton Bank, relying upon the assign-

ment aforesaid, dated December 18, 1911, and notification aforesaid made and given April 3, 1912, and relying upon the representations made by Lewis A. Hicks Company that the said contract had been completed and the work done thereunder accepted, and relying upon the notification, representations and statements of Lewis A. Hicks Company that there was forty-three hundred dollars (\$4300.) due Sullivan Fireproof Partition Co. and this plaintiff by virtue of the assignment aforesaid, and relying upon the assignment, notification of April 3, 1912 aforesaid, representations and statements of Lewis A. Hicks Company that said contract aforesaid had been completed and the work thereunder accepted according to the terms thereof, said Ladd & Tilton Bank did, relying upon all the statements aforesaid, release unto its own prejudice to Sullivan Fireproof Partition Co. all moneys which came into its possession, which said moneys had been paid to Ladd & Tilton Bank by the Lewis A. Hicks Company by virtue of the assignment aforesaid, the said Ladd & Tilton Bank relying upon the last moneys due and payable under said contract to reimburse itself for the loans made to Sullivan Fireproof Partition Co. And if it had not been for the assignment, and notification dated April 3, 1912, and the statements and representations made by the Lewis A. Hicks Company, all as aforesaid, the said Ladd & Tilton Bank would not have released all of said funds which came into its possession as aforesaid, but would have applied the same, as it had a

right to do, on account of the indebtedness due to itself from the Sullivan Fireproof Partition Co. That Ladd & Tilton Bank relied upon the written notice above referred to and the statements and representations therein contained and believed therefrom that the Sullivan Fireproof Partition Co. had fully completed the contract aforesaid and that the work had been accepted thereunder and believed that the full sum of \$4300. was due on account thereof and that the same would be paid forthwith by Lewis A. Hicks Company, and if it had not been for the assignment and notification above set forth Ladd & Tilton Bank would not have released to Sullivan Fireproof Partition Co. all the funds which came into its hands and belonging to Sullivan Fireproof Partition Co. in excess of the indebtedness due and owing to it from the Sullivan Fireproof Partition Co. The said Ladd & Tilton Bank did, after receiving the notification of April 3, 1912, above set out, and in reliance thereon pay unto Sullivan Fireproof Partition Co. the full sum of seven hundred dollars (\$700.) the said sum being the difference between the amount which the Lewis A. Hicks Company specified in said notice as being the balance due under said contract and which it would pay and the amount of the indebtedness due from Sullivan Fireproof Partition Co. to Ladd & Tilton Bank on that date.

IV.

That on April 3, 1912, the indebtedness due and owing from the Sullivan Fireproof Partition Co. to

Ladd & Tilton Bank was overdue and the said Sullivan Fireproof Partition Co. was at that time a going concern and actively engaged in business within the State of Oregon, and the said Ladd & Tilton Bank could have adopted such means and taken such steps as were proper and necessary to secure the repayment of the said indebtedness and could have applied the money then in its possession or which afterwards came into its possession by virtue of said assignment on said indebtedness, but on the contrary the said Ladd & Tilton Bank, believing the statements and representations of Lewis A. Hicks Company to be true and the written notices given thereunder to be true, and further believing and relying upon the fact that the full sum due on account of the contract would be paid to it by virtue of said assignment aforesaid did not so apply said money or adopt such means or measures to secure the payment of said indebtedness due from Sullivan Fireproof Partition Co. to itself, which application of money or means and measures if adopted would have caused reimbursement to the above named plaintiff for the loans so made to the Sullivan Fireproof Partition Co. That subsequently the Sullivan Fireproof Partition Co. became unable to make payment of its outstanding indebtedness and withdrew from active business in the State of Oregon, and this plaintiff, because of the acts and facts aforesaid, is now deprived of any recourse against said Sullivan Fireproof Partition Co. on account of the indebtedness aforesaid.

V.

That because of the facts herein stated Ladd & Tilton Bank was lulled into a position of false security and was prevented from taking such steps as would have been necessary and proper to enforce and collect the indebtedness due from Sullivan Fireproof Partition Co. to itself at a time when the collection of said indebtedness could have been enforced, and because of such facts as herein stated the said Ladd & Tilton Bank changed its position, all to its subsequent detriment as herein set forth.

VI.

That heretofore the Lewis A. Hicks Company has elected to pay unto Ladd & Tilton Bank the balance due as aforesaid, and which remained unpaid, by virtue of its contract with the Sullivan Fireproof partition Co., the assignment of the funds thereunder and notification subsequent thereon, all as is herein more particularly set forth, which election on the part of the Lewis A. Hicks Company was made with full knowledge, or with opportunity of full knowledge, of all the facts, circumstances and conditions surrounding the contract entered into between Lewis A. Hicks Company and the Sullivan Fireproof Partition Co. and the performance of the work thereunder and the fulfillment of the terms and conditions thereof and the assignment of the moneys accruing thereon.

VII.

That Lewis A. Hicks Company is not liable to any of the unpaid creditors of the Sullivan Fireproof Par-

tion Co. for any money which may be due to said unpaid creditors on account of any of the work done on the said New Lincoln High School, inasmuch as the said Lewis A. Hicks Company, prior to the commencement of operations under said contract between said Lewis A. Hicks Company and said Sullivan Fireproof Partition Co. exacted from the Sullivan Fireproof Partition Co. a bond with good and sufficient surety thereon, which bond was conditioned to secure the faithful performance of said contract on the part of the Sullivan Fireproof Partition Co. and particularly the said bond was given to indemnify and save harmless the said Lewis A. Hicks Company against all and any unpaid creditors of the said Sullivan Fireproof Partition Co. on account of any work done on the New Lincoln High School, which bond was in the penal sum of six thousand dollars (\$6000.) and is in words and figures as follows, to wit:

“BOND NO. 43981

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY.

Home Office, Baltimore, Md.

KNOW ALL MEN BY THESE PRESENTS:
That Sullivan Fireproof Partition Co. a corporation organized under the laws of the State of Washington (hereinafter called the Principal) and the United States Fidelity and Guaranty Company, a corporation created and existing under the laws of the State of Maryland, and whose principal office is located in Baltimore City, Maryland, (hereinafter called the

Surety) are held and firmly bound unto LEWIS A. HICKS COMPANY, a corporation, (hereinafter called the Obligee) in the full and just sum of Six Thousand and no-100 (\$6,000.00) Dollars, lawful money of the United States, to the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents, signed, sealed and delivered this 3rd day of November, A. D. 1911.

WHEREAS, said Principal has entered into a certain written contract with the Obligee, which contract was originally executed April 19th, 1911, between J. D. Sullivan, of Salt Lake Utah, and Lewis A. Hicks Company, and assigned to said principal on the 3rd day of November, 1911, wherein it is agreed to do and perform all the work for the plaster block partitions, inclusive of the furnishings and setting of all approved partition blocks with grounds, nailing blocks and backboards required for the fastening of lime or other materials attaching to the partitions, but exclusive of bucks for all openings to be supplied and set by the contractor at his own expense, on and in connection with a Brick and Steel High School Building, at Portland, Oregon, on Block 202, bounded by Mill, Market, Seventh and Park Streets. It is, however, expressly understood and agreed that this bond guarantees the completion of the contract in accordance with its terms and conditions, but is not intended and does not guarantee against damages for

personal injury or infringement of patents, as more specifically referred to in Sections VIII and IX of said contract.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and save harmless the said Obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law provided, however, that this bond is issued subject to the following conditions and provisions:

FIRST: That no liability shall attach to the Surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the Obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the Surety at its office in the City of Portland, Oregon, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said Obligee shall deliver written notice to the Surety at its office aforesaid, and the consent of the Surety thereto obtained, before making to the Principal the final payment provided for under the contract herein referred to.

SECOND: That in case of such default on the part of the Principal, the Surety shall have the right,

if it so desire, to assume and complete or procure the completion of said contract; and in case of such default, the Surety shall be subrogated and entitled to all the rights and properties of the Principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the Obligee, and all deferred payments, retained percentages and credits due to the Principal at the time of such default, or to become due thereafter by the terms and dates of the contract.

THIRD: That in no event shall the Surety be liable for a greater sum than the penalty of this Bond, or subject to any suit, action or other proceeding thereon that is instituted later than the 3rd day of November A. D. 1912.

FOURTH: That in no event shall the Surety be liable for any damage resulting from, or for the construction or repair of any work damaged or destroyed by any act of God, or the public enemies, or mobs, or riots, or civil commotion, or by employes leaving the work being done under said contract, on account of so-called "strikes" or labor difficulties.

IN TESTIMONY WHEREOF, the said principal has caused these presents to be sealed with its corporate seal, attested by the signature of its duly authorized officers, and the said surety has caused these presents to be executed by its Attorney-in-fact, sealed with its corporate seal, the day and year first above written.

SULLIVAN FIREPROOF PARTITION CO.

By A. C. Sullivan, Secretary.

Attest: J. D. Sullivan, President.

By A. C. Sullivan, His Atty. in fact.

THE UNITED STATES FIDELITY AND
GUARANTY CO.

By Douglas R. Tate, Attorney in Fact."

Countersigned by

Hartman & Thompson,

General Agents.

VIII.

That said bond was properly executed and was a good and sufficient bond and was so accepted by the Lewis A. Hicks Company and the said bond is now and has been at all times herein stated in full force and effect and binding upon each the principal and surety therein named, according to the terms thereof, and because of said bond the said Lewis A. Hicks Company will have or sustain no loss on account of any of the unpaid creditors of said Sullivan Fireproof Partition Co. for work done on the New Lincoln High School, and the said Lewis A. Hicks Company, because of said bond, has ample and sufficient security to indemnify it against all loss on account thereof.

IX.

That the said Ladd & Tilton Bank has no security for indemnity for the repayment of the money due from the Sullivan Fireproof Partition Co. other than as is herein set out and which arises by virtue of the assignment of December 18, 1911, and the notification of April 3, 1912.

X.

That because of all the facts in the complaint and further reply set forth the Lewis A. Hicks Company ought to be and is now estopped to deny that the full sum of thirty-six hundred dollars (\$3600.) is not now due to said Sullivan Fireproof Partition Co. and Ladd & Tilton Bank, its assignee, all as aforesaid.

XI.

That by reason of the acts, facts, deeds, writings and other matters herein set forth and contained in the pleadings on file herein the Lewis A. Hicks Company has lulled the said Ladd & Tilton Bank into a position of false security and caused it to change its position and release moneys in its possession or which came into its possession and which belonged to the Sullivan Fireproof Partition Co. and with which Ladd & Tilton Bank could have reimbursed itself on account of said loans, and has prevented it from enforcing the collection of its indebtedness against the Sullivan Fireproof Partition Co. at the time when the said Sullivan Fireproof Partition Co. was a going concern and able to pay the same, and the said Lewis A. Hicks Company ought to be and is estopped from asserting that there is no money due to the Sullivan Fireproof Partition Co. or this plaintiff by virtue of the assignment and notification and other facts as above set forth.

WHEREFORE, plaintiff asks judgment as prayed for in the complaint.

WOOD, MONTAGUE & HUNT,
Attorneys for Plaintiff.

[Endorsed]: Second Amended Reply. Filed Dec. 14, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 10 day of March, 1913,
there was duly filed in said Court, an Opinion, in
words and figures as follows, to wit:

[Opinion.]

(Title.)

BEAN, District Judge.

The facts material to this controversy are that in January, 1911, the defendant Hicks & Company, a corporation, entered into a contract with School District No. 1, Multnomah County, Oregon, to furnish material and labor necessary for the erection and construction of a public school building and as required by section 6266 L. O. L., executed and delivered to the District a bond with approved surety, conditioned that it would promptly make payments to all persons supplying labor or material for any portion of the work provided in the contract. Thereafter and in April, 1911, Hicks & Company sublet a portion of the work to one J. D. Sullivan, and by the terms of the written contract between it and Sullivan, Sullivan agreed to pay promptly as they became due all sums for work and labor done or material furnished in the doing of the work specified therein "and in case of any default on the part of the sub-contractor (Sullivan) the contractor (Hicks & Co.) shall have the

right to pay said sums together with any additional sums the payment of which is necessitated by such default of the sub-contractor, either for costs, attorneys fees or otherwise, and all sums so paid by the contractor shall be repaid by the sub-contractor, and the contractor may withhold any money due the sub-contractor until such indebtedness is repaid."

Sullivan thereafter assigned his contract, with the consent of Hicks & Company, to the Sullivan Fireproof Partition Company and such company, for the purpose of obtaining a banking credit with the plaintiff, made, executed and delivered to it on December 18, 1911, the following order:

"Portland, Ore., Dec. 18, 1911.

"Lewis A. Hicks Company,
Worcester Building,
City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this city.

This order is meant to cover only as to payment and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

Sullivan Fireproof Partition Co.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres.

& Sec'y."

This order was duly accepted in writing by Hicks & Company. Thereafter the Sullivan Fireproof Partition Company proceeded with the execution of its contract and payments thereon from time to time by Hicks & Company were made by its checks in favor of the plaintiff, which checks were endorsed by the plaintiff without recourse and delivered to the Sullivan Company and passed to its credit on the books of the bank. The contract of the Sullivan Company was completed some time in March, 1912. At that time there was due the plaintiff from the Sullivan Company about \$3600.00 for money advanced on the security of the order or assignment of December 18, 1911, and there was also a balance of about \$4300.00 unpaid on the contract between Hicks & Company and the Sullivan Company. The Sullivan Company desired to use \$700.00 of the latter amount in payment of sundry small claims against it, but the plaintiff declined to consent thereto without a written statement from Hicks & Company showing the condition of the account between it and the Sullivan Company. Thereupon Hicks & Company gave the Sullivan Company for delivery to plaintiff the following statement or letter:

"April 3rd, 1912.

"Sullivan Fireproof Partition Company,
City.

Gentlemen:

As your work has been completed on the Lincoln High School there will be due you on or about May 1st

the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY.

By Fred A. Katz."

This statement or letter was delivered by the Sullivan Company to the plaintiff and thereupon Hicks & Company drew its check for \$700.00 in favor of the plaintiff, which check was endorsed by it and delivered to the Sullivan Company and by it used in payment of its debts.

At the time the letter of April 3rd was written and the \$700.00 check drawn there were and are now unpaid claims for labor and material furnished the Sullivan Company and used by it in the performance of its contract with Hicks & Company, amounting to about \$4500.00, which Hicks & Company admit its liability to pay, and on account thereof Hicks & Company in May, 1912, refused to make any further payments to the plaintiff on the assignment of December, 1910, and hence this action.

Under the bond of Hicks & Company to the School District it and its surety became liable for the payment of labor and material furnished to sub-contractors and which were used in the construction of the building, and to an action in the name of the state

for the use and benefit of the labor and material claimants. (Sec. 6266 L. O. L. Hill vs. American Surety Co., 200 U. S. 197. Smith vs. Mosier, 169 Fed. 430.) The order and assignment from the Sullivan Company to the plaintiff was subject and subordinate to the terms of the contract between it and the defendant and their respective rights and liabilities thereunder. The plaintiff therefore knew or was chargeable with knowledge at the time it accepted the order and assignment and made advances thereunder that Hicks & Company was liable for the payment of claims for labor and material furnished the Sullivan Company in the performance of its contract.

The contention is made on behalf of the plaintiff (1) that Hicks & Company cannot assert as a defense to this action is liability for unpaid labor and material furnished the Sullivan Company until it has paid and discharged them. And (2) that its liability under its bond is for such claims only as could be made the basis of a mechanic's lien if such lien could be filed against a public building.

I am unable to concur in the first position and it is unnecessary to consider the other for, without detailing the evidence, it clearly shows that the unpaid material and labor claims for which liens could have been filed amount in the aggregate to more than the sum now claimed by the plaintiff. The statute (Sec. 6266) in pursuance of which Hicks & Company's bond was given provides that any person furnishing labor or supplying material for the construction of the build-

ing specified in the contract and bond may, when payment for the same has not been made, have a right of action and is authorized to bring suit in the name of the state for his use and benefit against the contractor and surety, and to prosecute the same to final judgment and execution. Hicks & Company and its surety were therefore personally liable for unpaid labor and material claims of the Sullivan Company. The fact that such claims are still unpaid would be a good defense to an action by the Sullivan Company to recover on its contract, and the plaintiff stands in the place and stead of the latter, it is a proper defense to this action.

The principal contention of the plaintiff is that the defendant is estopped by its letter of April 3, 1912, from now asserting that there is not due and owing from it to the Sullivan Company the amount stated therein less the \$700.00. Assuming but not deciding that the letter amounted to a declaration by Hicks & Company that the sum of \$4300.00 was then due and payable to the Sullivan Company and that such sum would be paid the plaintiff in any event, and not a mere declaration that there was such a balance unpaid on the contract with the Sullivan Company, and assuming further that the plaintiff so understood it and relied thereon, there is no room for an application of the doctrine of estoppel because the undisputed facts show that the plaintiff was not thereby misled to its injury. It was no doubt lulled into inaction and in reliance thereon took no steps at the time to

enforce its claim against the Sullivan Company, but the undisputed evidence is that the Sullivan Company was in no worse position financially in May, when the defendant refused to make the payment than it was when the letter was written. The theory of an estoppel in pais is that one who by his acts or conduct has misled another to believe a given state of fact to be true and to act thereon, shall not be permitted to assert the contrary to the injury of the person so acting. The important condition of the right to assert such estoppel is the fact in addition to all others that the party pleading it must show that the attempted repudiation will work him injury by causing him to suffer a loss of some substantial character or that he was thereby induced to alter his position for the worse in some material respect. (16 Cyc. 744; *Dickerson vs. Colgrove*, 100 U. S. 578.) Plaintiff was in no way injured by its delay in proceeding against the Sullivan Company, but its remedy against that company was as full and complete in May, when the defendant refused payment, as it was when the letter of April 3rd was written. It was not injured on account of the \$700.00 payment because it was made to pay claims which could have been asserted against it by the defendant, and moreover, it could not rightfully have applied such payment to its own account because it was made on the express understanding of all parties that it was to go to the discharge of labor and material claims.

Plaintiff claims that the defendant is protected by

a bond which it received from the Sullivan Company at the time the sub-contract was entered into and that it has commenced a suit to enforce such bond. The bond was to indemnify the defendant for claims for labor and material and the payment to plaintiff would not be covered thereby.

[Endorsed]: Opinion. Filed Mar. 10, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 10 day of March, 1913, the same being the 7th judicial day of the Regular March, 1913, Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment Entry.]

(Title.)

This cause having heretofore been duly tried by the court, a jury having been waived, upon the admissions in the pleadings and evidence produced in open court, the plaintiff appearing by Isaac D. Hunt of its attorneys and the defendant appearing in Warren E. Thomas and Lester W. Humphreys of its attorneys, and the court at said time not being fully advised in the premises and having taken the matter under advisement and being now fully advised therein, and the court does hereby generally find in favor of the defendant and against the plaintiff, and does hereby make a general finding that the plaintiff take

nothing in the above entitled action, and that the same be dismissed and that the defendant have judgment against the plaintiff for the costs and disbursements of this action.

NOW, THEREFORE, based thereon, it is ordered and adjudged that there is nothing due or payable from the defendant to the plaintiff in the above entitled action, and that plaintiff take nothing thereunder, and that said action be and the same is hereby dismissed, and that the defendant have and recover of and from the plaintiff its costs and disbursements of this action taxed at \$33.40, and that execution do issue therefor.

And afterwards, to wit, on the 29 day of May, 1913, there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows, to wit:

[Bill of Exceptions.]

(Title.)

Now comes the plaintiff herein, Ladd & Tilton Bank, a corporation, by Wood, Montague & Hunt, its attorneys, and presents this its bill of exceptions as follows:

This cause came on to be heard on the 24th day of February 1913, before the Honorable R. S. Bean, Judge of the United States District Court for the District of Oregon, sitting at Portland, Oregon, without a jury, a jury having been waived ~~in writing~~ by all the parties, the plaintiff appearing by Isaac D. Hunt of counsel for the plaintiff, and the defendant appear-

ing by Warren E. Thomas and Lester W. Humphreys, of counsel for the defendant, all parties having announced themselves ready for trial the following proceedings were had and testimony given.

Mr. A. C. SULLIVAN, a witness called on behalf of the plaintiff, after being duly sworn, testified, among other things, on cross examination, as follows:

Questions by Mr. THOMAS:

Q. Do you remember, Mr. Sullivan, how the amount of the unpaid claims of the various material-men furnishing stuff to you upon this building is—what the amount is?

A. Somewhere about \$4500.00.

Q. About \$4500.00. Have you, Mr. Sullivan, your books here indicating the amounts that are due to the various claimants?

A. Yes.

Q. I will ask you to produce them. (Witness gets books.) What book is that you have, Mr. Sullivan?

A. I call it a ledger.

Q. Call it a ledger. Who made the entries in that book?

A. I did.

Q. So that the entries therein are from your own personal knowledge?

A. Yes, sir.

Q. And they were not entered by anybody else?

A. No, sir.

Q. Is there anything in there, Mr. Sullivan, in con-

nection with the claim of Roebling's Sons Company against the Sullivan Fireproof Partition Company?

A. Yes, sir.

Q. Will you state what the Roeblings' Sons Company furnished to you, if anything, that caused that charge to be put in that book?

To which question the plaintiff objected on the ground that the same was not proper cross examination and was incompetent, irrelevant and immaterial and not pertinent to any issues made by the pleadings.

The court sustained the objection upon the ground that the same was not proper cross examination and thereafter counsel for the defendant made Mr. Sullivan his own witness and continued as direct examination.

Questions by Mr. THOMAS:

Q. What were the things that Roebling & Sons' Company furnished you in connection?

A. There was reinforcing wire.

Thereupon the plaintiff objected to the question and answer and further objected to the testimony which was being elicited from the witness and objected to the continuation thereof upon the ground and for the reason that the same was incompetent, irrelevant and immaterial and not pertinent to any issues made by the pleadings in this case, which objection was then and there overruled by the court, to which ruling the plaintiff then and there excepted,

which exception was then and there duly allowed by the court.

Questions by Mr. THOMAS continued.

Q. Now what did you say that stuff was that Roebling & Sons' Company furnished?

A. It was reinforcing wire.

Q. Where was that used?

A. It was used in making these blocks.

Q. Blocks for what?

A. Partition blocks.

Q. Partition blocks. Where were the partition blocks used?

A. In the partition work at the Lincoln High School, and other places as well.

Q. What was the amount of the claim of Roebling & Sons?

A. It totaled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

On cross examination as to the above point Sullivan testified as follows:

Questions by Mr. HUNT:

Q. Now you say you testified that the Roeblings' Sons claim is the only one that has been paid.

A. Yes, of those we have mentioned.

Q. Do you know that it was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they

told you?

A. Yes, Roebling never told me.

Q. You don't know of your own knowledge that it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them—not from Roebling.

Q. Well, I won't object to the manner you know it, but do you know how it was paid?

A. I think through a judgment entered against us and Roebling garnisheed the money that Hicks had, for our account.

Mr. HUNT: For the purpose of the record, your Honor, I would like to move that the payment of Roebblings' Sons Company's claim be stricken out for the reason that it was paid under a writ of garnishment served upon the Hicks Company, and under the rule of law, Hicks Company could not retain under this assignment anything due, and therefore whatever they did retain was of course beyond their power to do so.

Thereafter A. C. Sullivan testified in the direct examination, as follows:

Questions by Mr. THOMAS:

Q. I will call your attention to the claim of the Acme Cement Plaster Company. Will you look at the book and see if there is anything there in connection with the Acme Cement Plaster Company?

A. Yes, sir, the book shows we are owing them

\$836.55.

Q. What was that for?

A. It was for plaster.

Q. Where was the plaster used?

A. It was used in making blocks.

Q. And those blocks were used in the Lincoln High School?

A. Lincoln High School building.

Q. Has this sum of \$836.55 been paid?

A. No, sir.

Q. That is still due the Acme Cement Plaster Company?

A. Yes, sir.

Thereupon counsel for the plaintiff moved the court to strike from the record the testimony of A. C. Sullivan relative to the claim of the Acme Cement Plaster Company upon the ground and for the reason that if anything was due the Acme Cement Plaster Company it had not been paid and the amount of the indebtedness thereof was not liquidated; that it was capable of ascertainment and being made certain, and that the witness should not be permitted to testify to unliquidated or contingent claims, and for the further reason that the same was incompetent, irrelevant and immaterial, which motion was denied by the court, to which ruling the plaintiff then and there duly excepted, which exception was then and there duly allowed by the court.

Thereafter counsel for the defendant started to continue the examination of the witness A. C. Sullivan,

relative to the unpaid, unliquidated claims against Sullivan, and counsel for the plaintiff objected to such testimony being received upon the ground and for the reason that all of said claims and accounts alleged to be due and owing from Sullivan to unpaid creditors were unliquidated and uncertain; that the same were pleaded as damages, and were capable of being made definite and certain, and that the same had not been reduced to a definite and certain amount so as to enable the same to be pleaded as an element of damages, and further that any and all of said testimony was incompetent, irrelevant and immaterial to any issues made and presented by the pleadings in this case and to any facts to be determined therefrom, which objection was overruled by the court, to which ruling the plaintiff then and there duly excepted, which exception was then and there duly allowed by the court. Counsel for plaintiff then requested the court that it be considered as making objection to each and all of said testimony relating to any and all of said claims, without any formal objection thereto, and the court then and there stated that the plaintiff should be considered as interposing an objection to each and all of said testimony as relating to any of said claims on account of alleged unpaid creditors of the said Sullivan Fireproof Partition Co.; that all of said objections should be deemed to be overruled by the court and that the plaintiff should in each instance have an exception thereto and which would be and was duly allowed by the court.

Thereafter the examination continued as follows:

Q. That was for material furnished and used in the Lincoln High School Building?

A. Yes, sir.

Q. Now, will you refer to the Atlas Mixed Mortar Company.

A. We are owing them \$121.30.

Q. What for?

A. For sand and hauling.

Q. In what connection?

A. The Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Portland Quarry Company.

A. We are owing them \$134.00 for hauling away rubbish from the Lincoln High School.

Q. Hauling rubbish away from the Lincoln High School?

A. Yes, sir.

Q. In connection with your contract there?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the Columbia Contract Company.

A. We are owing them \$114.08.

Q. For what?

A. For sand furnished to the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Columbia Hardware Company.

A. We owe them \$30.22, as near as I was able to figure it out on the Lincoln High School. We bought hardware from different firms, and a part was delivered to our place on the east side, but as near as I could segregate it, we owe them \$30.22 on the High School.

Q. Do you happen to know the full amount you owe the Columbia Hardware Company?

A. We owe them in addition to the \$30.22—we owe them \$72.33.

Q. But that is not connected with these?

A. No connection with the school.

Q. Has that \$30.22 been paid?

A. No, sir.

Q. I call your attention to the claim of the East Side Transfer Company.

A. We owe them \$75.65.

Q. What is that for?

A. For hauling.

Q. Hauling of what?

A. Hauling blocks.

Q. To the Lincoln High School Building?

A. To the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of E. Hip-

peley.

A. That is still owing, \$32.35.

Q. What was that for?

A. That was for the rent of motors and some repair work, some wiring.

Q. In the Lincoln High School building?

A. In the Lincoln High School, yes, sir, incidental to this contract.

Q. Incidental to this contract. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Northwest Door Co.

A. We are owing them \$51.05.

Q. What was that for?

A. For some wood parts for our machinery as used at the Lincoln High School.

Q. What was that? Just explain so we can understand.

A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

Q. These blocks were hollow; is that the idea?

A. They were hollow and these wood cores were used for making that hollow part; after these blocks were molded in a machine, they are taken out and the wood cores were knocked out.

Q. Those are necessary things in the construction of these blocks?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Oregon Transfer Company.

A. We are owing them \$72.75.

Q. What was that for?

A. For hauling at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Portland Machinery Company.

A. We are owing them \$47.85. That is for—I think it was a fan and some dry kiln trucks used in the operation of drying the blocks.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

A. We owe them \$26.80 for power, and \$26.10 for lights at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of George B. Rate.

A. We owe them \$13.75 for some plaster hair.

Q. Plaster hair?

A. Yes, sir.

Q. Was that used at the Lincoln High School?

A. Yes, sir, I think it was; as near as I can tell it was.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Union Oil Company.

A. We are owing them \$78.25.

Q. What was that for?

A. That is for coal oil furnished at the Lincoln High School.

Q. How was it used?

A. It was used as a sort of lubricant in knocking out these cores.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Western Lime & Plaster Company.

A. We owe them \$1285.91.

Q. What was that for?

A. For plaster.

Q. Used at the Lincoln High School building?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of Wright & Branch.

A. Wright & Branch—we owe them a balance of \$1400.00.

Q. A balance of \$1400.00?

A. Yes, sir.

Q. For what?

A. It is a balance due them on a sub-contract that

they took from us for erecting partitions.

Q. In the Lincoln High School Building?

A. In the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the United States Steel Products Company.

A. We owe a balance of \$150.00.

Q. What was that for?

A. That is for wiring—wire—reinforcing wire.

Q. That is used in these blocks? A small wire?

A. A small chicken wire.

Q. Used as a reinforcement?

A. Yes, sir.

Q. That was used in these blocks used in the Lincoln High School?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Mr. A. C. SULLIVAN, on being cross examined by counsel for the plaintiff relative to the foregoing testimony, testified as follows:

Questions by Mr. HUNT:

Q. Will you just turn to that book, the pages you had there, Mr. Sullivan, please.

A. Yes, sir.

Q. The Acme Cement Plaster Company, you testified for certain material. What was it? I couldn't understand.

A. That was plaster.

Q. And what was the Atlas Mixed Mortar Company?

A. That was sand and hauling.

Q. That was sand and hauling?

A. Yes, sir.

Q. Can you segregate the two items?

A. Well, hardly. I should say about half and half.

Q. About half and half?

A. That is a guess, though.

Q. And the Portland Quarry Company.

A. That was hauling the rubbish away from the building, broken blocks and the refuse from the floors.

Q. And the Columbia Contract Company?

A. That was for sand.

Q. Any transportation charges in that?

A. What? Hauling to the building, do you mean?

Q. Did they have any transportation charges in this amount you have here?

A. That included the cost of the sand delivered at the High School.

Q. And the Columbia Hardware Company?

A. Why for various forms of hardware we bought from them. Used tools of various kinds.

Q. Tools?

A. Tools, and—oh, parts of machinery and parts of boilers and such as that.

Q. That was a part of your permanent equipment and plant, was it not?

A. Part of it was, yes.

Q. Did any part of that enter into the construc-

tion of the building?

A. No, the tools were only used in carrying out the work of construction, and the parts of the boilers were used in the boilers in the drying of material.

Q. Who purchased from the Columbia Hardware Company?

A. From them?

Q. Yes.

A. There was a foreman.

Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

A. Yes, sir.

Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the material used in making the blocks. This motor was used in driving that mixer.

Q. You rented a motor from him?

A. Yes, sir.

Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

Q. That was a part of the manufacture of the

block, was it not?

A. Yes, a part of the process of making the block.

Q. Now the Oregon Transfer Company was for hauling?

A. Hauling, yes.

Q. Hauling the blocks?

A. Hauling the blocks to the building.

Q. Hauling the wood blocks or the plaster blocks?

A. No, the plaster blocks.

Q. The Portland Machinery Company I believe you said was for dry kiln trucks.

A. Dry kiln trucks, and I think for a fan, if I remember right.

Q. These trucks, just common trucks to put stuff on to carry around?

A. They call it a dry kiln truck; it is used as a part of a car that goes into the dry kiln to carry blocks.

Q. And the fan, what is that?

A. I am not so certain whether their bill included that fan, or whether or not we paid for it. We had a fan and bought it from them, I can't recall whether or not it was paid for.

Q. Then if this bill of \$47.85 does not include the fan, it is all for trucks?

A. Yes, sir, I think that is all we bought from them.

Q. Where are those trucks now?

A. They are over here in a basement where part of this machinery is.

Q. Part of your plant—part of your equipment, are they?

A. They are now, yes.

Q. They were then?

A. They were used as part of the equipment, yes.

Q. Now, the Portland Light & Power Company has a bill of \$52.90 for power and light. What was that power furnished for?

A. To drive the motor.

Q. To drive the motor?

A. Yes, sir.

Q. What motor—the Hippeley motor?

A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

Q. And the light was what?

A. Lights used around the place where we were working.

Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it not?

A. Yes, sir.

Q. George B. Rate, he furnished plaster hair, is that it?

A. Yes, sir.

Q. Plaster hair?

A. Yes, sir.

Q. Wright & Branch had a sub-contract for placing the partitions?

A. For placing the partitions.

Q. And the United States Steel Products Com-

pany for reinforcing?

A. For wire.

Q. Reinforcing wire?

A. Yes.

Q. Is there any man on this list, Mr. Sullivan, who furnished any material directly that went into the building, or wasn't the material that was furnished, furnished the Sullivan Fireproof Partition Company to be afterwards manufactured into stuff that went into the building?

A. The only thing that actually went into the construction of this building as far as we were concerned were these blocks.

Q. That is the thing you manufacture?

A. Yes, sir.

Q. That is the thing you agree to furnish in your contract?

A. We agreed to furnish and erect them.

Q. And erect them?

A. Yes, sir.

Q. And the stuff you speak of here was sold to your company individually in the course of your manufacture?

A. This was all sold to us to be used in making these blocks—I think, without going over each item.

Q. And do you know whether or not any material was furnished by these parties that went into blocks, which blocks were placed in any other buildings and other places, other than the Lincoln High School?

A. Yes, we had a surplus number of blocks from

the school that were taken away and used on the Smith Hotel Building.

Q. Where is that?

A. I think called it Sixth and Main, if I remember right.

Q. That is in the City of Portland?

A. City of Portland, yes, sir.

Q. About how many was that, do you know?

A. Probably about ten thousand feet.

Q. About ten thousand feet?

A. Yes, sir.

Q. And I want to be perfectly sure that a portion of the material that you have testified to here went into these blocks that went into that Hotel at Sixth and Main.

A. Well, how we come to have these, in making blocks that we used in this school, in our machines we got three of the size used in the school and one smaller size, a three inch block used in ordinary partitions, and we had no use at the school for any number of these three inch, such as we would have in making a six inch. We had to provide a place of putting them; it was considered sort of a waste, that is, as far as the school was concerned, so we got this Smith job and hauled a considerable number there, but we were afterwards stopped from doing that by the Hicks Company and the architects, so that we finished up delivering to that building from our place on the East side.

Thereafter when the plaintiff had rested and the

defendant had rested and there was no further testimony or evidence to be offered in behalf of either party, the plaintiff moved the court for a judgment on the pleadings, and also for a verdict and judgment on the pleadings and testimony, which said motions were based upon the following grounds:

1. That the defense of estoppel as set forth in the plaintiff's reply was clearly established and that the defendant Lewis A. Hicks Company was bound by the written assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank, and the acceptance thereof by the Lewis A. Hicks Company, dated the 18th day of December, 1911, and the written notification given by the said Lewis A. Hicks Company, based on the written assignment and acceptance, which said written notification was dated April 3, 1912, and that the facts and matters set forth in the pleadings by the defendant did not constitute a defense to the matter of estoppel pleaded by the plaintiff.

2. That the claims for materials furnished and labor done by the materialmen and laborers were contingent and uncertain; that the same was pleaded as a matter of defense and as damages; that the same were improper and insufficiently pleaded, and further were pleaded as uncertain and unliquidated damages and the same did not constitute a proper defense or any defense to the plaintiff's action and the testimony admitted thereon was not properly received; that the said defense and allegations thereof and the testi-

mony thereto should be disregarded.

3. That the materials furnished by the materialmen and the labor performed by the laborers was not such as would give rise to or sustain a mechanic's lien in the State of Oregon.

4. That inasmuch as the building which the Lewis A. Hicks Company had a contract to erect and was erecting was a public school building and could not be liened by materialmen or laborers the bond which the Lewis A. Hicks Company gave to insure the performance of its contract took the place of the building for the purpose of mechanics' liens, and that if a mechanic's lien could not have been successfully asserted against a building which would be lienable under the laws of the State of Oregon on account of materials or labor furnished, then such claim could not be successfully placed or filed against said bond, and further that no greater right or privilege was given by or could be asserted against the said bond than against a lienable building under the laws of the State of Oregon.

5. The testimony shows that all of the materials furnished to the Sullivan Fireproof Partition Co., the sub-contractor, did not enter into the Lincoln High School building, the building which the Lewis A. Hicks Company was under contract to erect, and that under the laws of the State of Oregon relative to mechanics' liens the various bills for labor and materials were not capable of being asserted against the bond which took the place of the building for lien purposes.

6. That the testimony shows that the materials furnished by the various materialmen and the labor performed by the various laborers for the Sullivan Fireproof Partition Co. on account of its sub-contract with the Lewis A. Hicks Company, was furnished and performed upon the credit of the Sullivan Fireproof Partition Co. and not upon the credit of the building or upon the credit of the bond, and furthermore that none of the materials furnished the Sullivan Fireproof Partition Co. entered into the said building, but the same were used for the purpose of manufacturing a new commodity, entirely separate and distinct from the component parts thereof, and composed of the materials furnished by the various materialmen, and the whole character of the materials being changed and commingled into a new and distinct manufactured article, they lost their original character to such an extent as to be non-liable items under the laws of the State of Oregon against the bond, the bond having taken the place of the building for the purpose of mechanics' liens.

Which said motions the court overruled, to which ruling the plaintiff then and there duly excepted, which exception was then and there duly allowed by the court.

That the testimony relating to the said motions is as follows, which said testimony as here follows is all of and the whole of said testimony and exhibits offered by the plaintiff and the defendant during said trial, and that no other testimony, evidence or ex-

hibits were offered or received in the trial of said cause.

ROBERT S. HOWARD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. HUNT:

You are Mr. R. S. Howard?

A. I am.

Q. What position if any do you hold with the Ladd & Tilton Bank?

A. I am assistant cashier of Ladd & Tilton Bank.

Q. And you were such assistant cashier in the month of December, 1911?

A. I was.

Q. And have been such assistant cashier since that time, down to the present time?

A. I have been.

Mr. HUNT: It is admitted in the pleadings, your Honor, that Ladd & Tilton Bank is a corporation entitled to do a banking business and loan money.

Q. I will ask you to state whether or not you know Mr. A. C. Sullivan.

A. I do.

Q. When did you first become acquainted with that gentleman?

A. In early December, 1911.

Q. Do you know whether or not Mr. Sullivan is an officer connected with the Sullivan Fireproof Partition Company?

A. He is secretary.

Q. Where was the place where you first saw Mr. Sullivan?

A. I met him in the Ladd & Tilton Bank.

Q. Did Mr. Sullivan have any purpose in approaching the bank at that time, or you?

A. Yes, he sought me for the purposes of a banking credit.

Q. And are you entitled by virtue of your position as assistant cashier in Ladd & Tilton Bank to loan banking funds?

A. Subject to the Finance Committee and under our local rules.

Q. Mr. Sullivan, I understand, approached you for a loan?

A. A loan, yes.

Q. What amount was asked for, Mr. Howard?

A. He said he needed \$3500.00.

Q. And thereupon what did you do?

A. I went through the usual procedure of introduction and verification and discussions.

Q. Did you require any submission of statements or other evidences of his solvency?

A. I asked him for a statement of the Sullivan Partition & Fireproof Company—Fireproof Partition Company.

Q. And was such a statement rendered you?

A. It was.

Q. Have you that with you?

A. I have. (Producing it.)

Q. Mr. Howard, I hand you an instrument which purports to be a statement of financial liabilities of the Sullivan Fireproof Partition Company, and will ask you to state if that instrument is what it purports to be.

A. It is.

Q. Is that the signature of Mr. Sullivan?

A. Sullivan, yes. Mr. A. C. Sullivan signed it as secretary.

Q. That was handed to you at that time ?

A. Yes, about that time ; yes.

Mr. HUNT: Now, I would like to ask to introduce this in evidence, your Honor.

Mr. THOMAS: We object as incompetent, immaterial and irrelevant in this case.

Mr. HUNT: I would like to show why it is competent if your ruling has not been announced. The chief defense, we might say, in this case is going to be that of estoppel and we want to show what the assets of the Sullivan Company were at the time we brought the suit—what we could have realized.

Mr. THOMAS: This is dated December, 1911, and can't possibly have any effect on us in this matter, in reference to matters occurring three or four months afterwards particularly.

COURT: I understand counsel expects to show conditions in 1912.

Mr. HUNT: I do, your Honor, but this statement shows a portion of the assets.

COURT: It is admitted, subject to counsel's ob-

jection, for whatever it may be worth hereafter.

Mr. THOMAS: Shall I take an exception at this time?

COURT: It is not necessary.

Mr. THOMAS: This is an action at law and the jury has been waived. If no exceptions are necessary, of course we wont take one.

Mr. HUNT: I wish to state, your Honor, that this is a financial statement submitted by the Sullivan Fireproof Partition Company, and shows assets in the sum of \$27,334.00. The corporation had subscribed capital stock of \$22,500, which was properly figured in the liabilities, making a total liability of \$27,334.00, but leaving out the capital stock, it leaves total assets of about \$22,000.00.

Statement admitted in evidence and marked

PLAINTIFF'S EXHIBIT 1.

Corporations

To Ladd & Tilton Bank, Portland, Ore.

Name (Corporate style under charter) Sullivan Fireproof Partition Company.

Business, Mfg. fireproof partition tile.

Location, Tacoma, Wash. Branches, Main 4675, Portland, Ore. 617 Bd. of Trade.

For the purpose of procuring credit, from time to time, with the above bank for our negotiable paper, or otherwise, we furnish the following as being a fair and accurate statement of our financial condition on the seventh day of December, 1911.

Assets.

Cash in Portland Trust Co. Bank.....	\$ 348.50
Cash on hand	
Bills Receivable, Good	655.00
Accounts Receivable, Good	3,855.50
Merchandise, finished (How valued, market)	3,075.00
Merchandise, unfinished (How valued....)..	
Raw Material (How valued, cost approx.)..	650.00
Real Estate	
Machinery and Fixtures	8,750.00
Other assets and of what composed.	
Patent rights	10,000.00
.....	
.....	
.....	
.....	
.....	
.....	
Total.....	<hr/> \$27,334.00

Liabilities.

Bills Payable for Merchandise.....	\$
Bills Payable to Own Banks.....	3,000.00
Bills Payable for Paper Sold.....	
Open Accounts	950.00
Bonded Debt (When Due).	
Interest on Bonded Debt	
Mortgages or Liens on Real Estate.....	

Chattel Mortgages

Loans or Deposits

Other indebtedness and of what composed.

.....

.....

.....

.....

Total liabilities 3,950.00

Capital 22,500.00

Surplus 884.00

Total.....\$27,334.00

Contingent Liability:

Accommodation Endorsements, nil.

Endorsed Bills Receivable Outstanding, nil.

Specify any of the above Assets pledged as collateral.

None.

Specify any of the above Liabilities secured by collateral.

None.

Capital.

Authorized, \$40,000.00. Subscribed, \$40,000.00.

Paid in, \$22,500.00.

Held by Company as Treasury Stock, \$17,500.00.

How paid in: Cash \$. Other property.

Plant, equipment, stock, patent rights, \$22,500.00.

Description of other property and how valued:

Property taken over was as above with outstanding

accounts and valued on invoice of cost and market price.

Incorporated in what State and under what general Law or Special Act: State Law of Washington.

Date of Charter, July 16, 1910. Commenced Business September 1, 1909.

Are Stockholders liable beyond amount of stock subscribed? No.

Amount of annual business, \$44,600.00. Amount of annual expenses, \$24,340.00. Annual Dividends 1910-11, 30 per cent.

Insurance carried on Merchandise, \$2000.00. On Real Estate, —.

Give basis of statement, whether actual inventory, by whom taken and date, or if Estimate, by whom made and date: Made on estimate of secretary as of December 6, 1911.

What amount, if any, of Acc'ts and Bills Rec. are past due, extended or renewed? Nil.

State last date of taking trial balance and if same proved.....Regular times of balancing books, August first.

Regular times of taking inventory, August first.

OFFICERS.

Name in Full—Address.

President, J. D. Sullivan. Address, 1064 E. 1st So. St., Salt Lake City, Utah.

Vice-President, A. C. Sullivan. Address, Buena Vista Apt., Portland, Ore.

Secretary, A. C. Sullivan. Address, Buena Vista Apt., Portland, Ore.

Treasurer, J. D. Sullivan.

DIRECTORS.

Name in Full—Address.

J. D. Sullivan.

A. C. Sullivan, Seattle, Wash.

Dan Swinehart, Seattle, Wash.

J. A. Murphy.

In whom is vested authority by resolution of the Board of Directors to sign notes binding the Corporation? J. D. Sullivan, President, and A. C. Sullivan, Secretary.

Please sign here

By A. C. Sullivan, Secy.

Date Signed, Dec. 7, 1911.

Q. Will you please state to the court the conversations had with Mr. Sullivan relative to this loan at this time.

Mr. THOMAS: We desire to object to this evidence, also if your Honor, please, for the same reason, being incompetent, immaterial and irrelevant.

COURT: I don't know what that has to do with it.

Mr. HUNT: A matter leading up to show how we obtained this assignment.

COURT: He can testify to that.

A. On talking with Mr. Sullivan, I said to him that his condition hardly warranted the loan he asked for, and after further talk, he offered the assignments

of moneys due or about to be due, or to become due on the work he was doing for the Lewis A. Hicks Company on the new Lincoln High School. I told him that, following the usual course of banking methods, if he would get an acceptance of such an order, we would be glad to finance it to that extent.

Q. Did Mr. Sullivan, pursuant to that conversation, get the accepted order from the Lewis A. Hicks Company?

A. He did.

Q. I hand you a paper, Mr. Howard, which purports to be an assignment of funds due the Sullivan Fireproof Partition Company from Hicks, signed by Sullivan and accepted by Hicks, and will ask you to state if that instrument is what it purports to be.

A. Do you wish me to read that in the record?

Q. No. Just state if that is what it purports to be.

A. It is.

Q. That is what was handed to you?

A. That is what was brought in to us.

Mr. HUNT: We desire to offer that.

A. Duly accepted.

Mr. HUNT: The execution of this assignment is admitted in the pleadings, so we will not prove that.

Mr. THOMAS: No objection.

Marked Plaintiff's Exhibit 2, and read as follows:

“Portland, Oregon, December 18, 1911.

Lewis A. Hicks Company,

Worcester Building,

City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for partition work in the new Lincoln High School in this city. This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION COMPANY.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres. and Secy.

ACCEPTED:

LEWIS A. HICKS COMPANY,

By Geo. Wagner, Mgr."

Q. Upon receipt of that assignment did Ladd & Tilton Bank advance to the Sullivan Fireproof Partition Company \$3500.00?

A. They did, in maturities of thirty, sixty and ninety days.

Q. How was that indebtedness evidenced?

A. By notes, one a thousand dollars, the second a thousand dollars, and \$1500.00 being ninety day maturity, the last one.

Q. Have you those notes with you?

A. I have. (Producing them.)

Q. I hand you what purports to be a promissory note made payable to Ladd & Tilton Bank for one thousand dollars, signed by the Sullivan Fireproof

Partition Company, dated December 18, 1911, and ask you to state if that instrument is what it purports to be.

A. It is.

Q. That was executed by the Sullivan Fireproof Partition Company?

A. It was.

Mr. HUNT: We desire to offer that in evidence.

Mr. THOMAS: No objection.

Marked Plaintiff's Exhibit 3.

\$1000.00 Portland, Oregon, Dec. 18th, 1911

Sixty days after date, without grace, Sullivan Fireproof Partition Co. promise to pay to the order of LADD & TILTON BANK, at Ladd & Tilton Bank, Portland, Oregon, One thousand and 00|100 Dollars, in U. S. Gold Coin, for value received, with interest from date in like coin, at the rate of eight per cent per annum, until paid.

And in case suit or action is instituted to collect this note, or any portion thereof, said company promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SULLIVAN FIREPROOF PARTITION CO.

By J. D. Sullivan, Prest.

By A. C. Sullivan, Secty.

No. 17553. Due Feb. 16, 1912.

June 29, 12

Address, Sullivan Tile Co., 129 E. Water. Phone E 586.

Mar. 23-12. Int. paid to Mar. 23, 1912, \$21.33.

Q. I hand you, Mr. Howard, what purports to be a promissory note in the sum of \$1500.00, dated December 18, 1911, payable to Ladd & Tilton Bank and signed Sullivan Fireproof Partition Company, and will ask you to state if that instrument is what it purports to be.

A. It is.

Q. Is that the signature of the Sullivan Fireproof Partition Company?

A. It is.

Mr. HUNT: We desire to offer this in evidence. It is of similar import only ninety days after date, your Honor.

Marked Plaintiff's Exhibit 4.

\$1500.00 Portland, Oregon, Dec. 18, 1911.

Ninety days after date, without grace, Sullivan Fireproof Partition Co. promise to pay to the order of LADD & TILTON BANK, at Ladd & Tilton Bank, Portland, Oregon, Fifteen hundred and 00|100 Dollars, in U. S. Gold Coin, for value received, with interest from date in like coin, at the rate of eight per cent per annum, until paid.

And in case suit or action is instituted to collect this note, or any portion thereof, said company promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SULLIVAN FIREPROOF PARTITION CO.

By J. D. Sullivan, Prest.

By A. C. Sullivan, Secy.

No. 17554. Due Mar. 17, 12.

June 29, 1912.

Address, Sullivan Tile Co., 129 E. Water. Phone E 586.

Mar. 23-12. Int. paid Mar. 23-12, \$32.00.

Q. Mr. Howard, I hand you what purports to be a promissory note dated January 17, 1912, in the sum of one thousand dollars, made payable to Ladd & Tilton Bank, signed by Sullivan Fireproof Partition Company, and will ask you to state if that instrument is what it purports to be.

A. It is.

Q. Is that signed by the Sullivan Fireproof Partition Company?

A. It is.

Mr. HUNT: We offer this in evidence. It is the same as the other notes, dated January 17, 1912, due March 17, 1912.

Marked Plaintiff's Exhibit 5.

\$1000.00 Portland, Oregon, Jan. 17, 1912.

On March 17, 1912, after date, without grace, Sullivan Fireproof Partition Co. promise to pay to the order of LADD & TILTON BANK, at Ladd & Tilton Bank, Portland, Oregon, One thousand & 00|100 Dollars, in U. S. Gold Coin, for value received, with interest from date in like coin, at the rate of eight per cent per annum, until paid.

And in case suit or action is instituted to collect this note, or any portion thereof, said company promise to pay such additional sum as the Court may ad-

judge reasonable as attorney's fees in said suit or action.

SULLIVAN FIREPROOF PARTITION CO.

By J. D. Sullivan, Prest.

By A. C. Sullivan, Secy.

No. 18116. Due March 17, 1912.

June 29, 1912.

Address, Sullivan Tile Co., 129 E. Water. Phone E 586.

Mar. 23-12. Int. paid to Mar. 23-12, \$14.66.

Q. Will you please state, Mr. Howard, if these notes represent the only loans made by Ladd & Tilton Bank to the Sullivan Fireproof Partition Company.

A. The only loans except a little note for an overdraft which doesn't effect this case.

Q. Were those notes just introduced in evidence, marked Plaintiff's exhibits 3, 4 and 5, the notes for which the assignment, marked plaintiff's exhibit 2, was given?

A. They are the notes.

Q. Will you please state, Mr. Howard, if any of the principal of these notes has been paid by the Sullivan Fireproof Partition Company or any one on its behalf.

A. Nothing.

Q. Has any sum been paid on the interest?

A. I think the interest was paid there—the interest shows as having been paid on each of the notes to March 23, 1912.

Q. Subsequent to the time of the execution and delivery of the assignment, marked Plaintiff's exhibit 2, and the execution and delivery of the promissory notes, marked plaintiff's exhibits 3, 4 and 5, did the Lewis A. Hicks Company pay the Ladd & Tilton Bank any moneys?

A. Question please.

Q. (Read.)

A. No.

Q. I mean, Mr. Howard, did the Lewis A. Hicks Company pay the Ladd & Tilton Bank the money earned by Sullivan under this contract?

A. Yes—you mean for the parties?

Q. Yes.

A. Yes, they made several payments; all made to the Ladd & Tilton Bank. I didn't understand your question.

Q. Were those payments made by check?

A. By check.

Q. And payable to the order of Ladd & Tilton Bank?

A. Ladd & Tilton Bank.

Q. And what method did Ladd & Tilton Bank adopt as to putting that fund—was it credited on the notes, or was the fund released for some other purpose?

A. It was released. They were endorsed—the checks were endorsed without recourse and turned over.

Q. Were endorsed by Ladd & Tilton Bank?

A. By Ladd & Tilton Bank.

Q. And were turned over to whom?

A. Turned over to Sullivan Fireproof Partition Company.

Q. Mr. Howard, do you know at what time the Sullivan Fireproof Partition Company completed its sub-contract with Lewis A. Hicks?

A. About March 15, 1912.

Q. Did you at that time make any effort or endeavor to collect what money was due you from the Sullivan Fireproof Partition Company?

A. Yes. On or about that date I was asked to release \$700. The way it begun—

Q. (Interrupting) By whom were you asked?

A. I was asked—Mr. Sullivan wanted to pay some bills and I told him that I would now have to have some definite date at which these moneys would be paid to us by the Lewis A. Hicks Company, and a representative from their office came in—

Q. (interrupting) Do you know what that gentleman's name was?

A. Mr. Catz or Katz, and he told me, as I remember, that the lien time—that Sullivan had finished—

MR. THOMAS: If the court please, it seems to me a conversation of that kind is not admissible in that particular connection. They are hanging upon a letter written by the Hicks Company to the Sullivan Fireproof Partition Company.

COURT: You are leading up?

Q. I am leading up.

Mr. HUNT: To show this was for Ladd & Tilton Bank and not for the Sullivan Company.

A. That the lien time against Mr. Sullivan's work would run out the latter part of the month, and that on or about May 1st they would be ready to pay us. I told him there was no objection to waiting but the time had arrived when I must have from them—from the Hicks Company—some definite date that I could look to for a settlement. And after that conversation Mr. Sullivan came in with the letter which has been read.

Q. It hasn't been introduced yet. I will hand you what purports to be a notification to the Sullivan Fireproof Partition Company, dated April 3rd, stating that \$4300.00 was due on the contract, and will ask you to state if that instrument is what it purports to be.

A. Yes.

Q. Do you know if that is the signature of the Lewis A. Hicks Company by Mr. Katz? That is Mr. Katz's signature?

A. Yes.

Mr. HUNT: The execution has been admitted in the pleadings and I will ask to have it introduced in evidence.

Marked Plaintiff's Exhibit 6, and read as follows:

"April 3rd, 1912.

Sullivan Fireproof Partition Co.,

City.

Gentlemen:

As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY.

By Fred A. Katz."

Q. You will please state whether or not the notification just read and marked plaintiff's exhibit 6, was made by the Lewis A. Hicks Company at the request of Ladd & Tilton Bank.

A. It was.

Q. Upon receipt of the notice of April 3rd, Mr. Howard, what action did the bank take towards this indebtedness of the Sullivan Fireproof Partition Company?

A. They released this \$700 requested, and waited for this maturity of Hicks.

Q. The maturity mentioned in the notification?

A. In the notification.

Q. Which date was May 1st?

A. May 1st, 1912.

Q. I will ask you to state whether or not at the date mentioned in the notification of April 3rd, which date is May 1st, if you made a demand on the Lewis A. Hicks Company for the balance due of \$3600.00?

A. Very soon thereafter. The exact date I didn't, but in a few days afterwards, I commenced agitation for this payment.

Q. And with whom did you communicate?

A. I communicated with, indirectly—first with Mr. Sullivan, and then communicated with Hicks Company's Office.

Q. What were you told by the Lewis A. Hicks Company at the time you communicated with them?

A. I was told that there was something had arisen there, which they couldn't—wouldn't pay us. That Mr. Hicks would be up in a few days from San Francisco and would take the matter up with us.

Q. Did Mr. Hicks come to the city of Portland in a few days?

A. He came in to see us.

Q. And what was the conversation you had with Mr. Hicks at that time?

A. Mr. Hicks said he desired to look into the matter; that he had just come up, and from his office learned that the Sullivan people were falling behind in their outstanding accounts, and that he wanted to seek the services of an attorney.

Q. Anything further said in that conversation?

A. Then later, I was—other than stimulating the matter, nothing further with Mr. Hicks.

Q. Did you later see Mr. Hicks?

A. I saw—Mr. Hicks came in the bank once, and I had a word or two with him, but nothing came of it. He was yet looking into the matter.

Q. Did Mr. Hicks at that time refuse to pay Ladd & Tilton—definitely refuse to pay Ladd & Tilton Bank?

A. He did.

Q. Or was he simply considering the matter, whether or not he would pay?

A. Oh, no. He said that he couldn't pay it.

Q. Did he assign any reason for not paying it?

A. On account of the indebtedness of the Sullivan people.

Q. Did he specify at that time what that indebtedness was?

A. No.

Q. Will you please state, Mr. Howard, the first time that you heard the Sullivan Fireproof Partition Company was indebted on account of the labor and material furnished under this sub-contract to the new Lincoln High School.

A. I have a note here that since this—our demand for the recognition of this promise to pay on May 1st.

Q. You first learned of that?

A. After that date.

Q. After May 1st?

A. After May 1st, 1912.

Q. And of course that would be subsequent then to the delivery of that notification of April 3rd?

A. It was.

Q. Will you please state, Mr. Howard, if you have ever seen the contract—if you had seen, prior to May 1st, 1912, the contract entered into by and between

the Sullivan Fireproof Partition Company and the Lewis A. Hicks Company?

Mr. THOMAS: We object as being immaterial, if your Honor please. They having accepted this order subsequent to the contract, they are bound to know the conditions of it.

COURT: He can state whether he ever saw it or not.

A. I saw it today for the first time.

Q. Did you at the time of the assignment, dated December 18th—did either Mr. Sullivan or any one on behalf of the Sullivan Fireproof Partition Company, or Mr. Hicks or any one on behalf of the Lewis A. Hicks Company, inform Ladd & Tilton Bank of the terms of that contract?

A. No.

Q. Did you or the Ladd & Tilton Bank have any knowledge that the Hicks Company could reserve money or funds under that contract?

A. No.

Q. Mr. Howard, if you had been informed by the Lewis A. Hicks Company or the Sullivan Fireproof Partition Company at any time prior to May 1st, 1912, that the Sullivan Fireproof Partition Company had an outstanding indebtedness on account of its subcontract with the Hicks Company on account of the furnishing of labor and material to the new Lincoln High School, which indebtedness was in excess of the funds due to the Sullivan Fireproof Partition Company, would you or the Ladd & Tilton Bank have

taken any action at that time, looking towards the collection of your indebtedness, or obtaining security therefor?

Mr. THOMAS: I object, if your Honor please, as calling for a conclusion of the witness, and as wholly immaterial.

Mr. HUNT: If your Honor please, the gist of this whole case—I am willing to agree if it will save counsel any trouble, that without this question of estoppel, I don't think we are in court, but on the question of estoppel it is the whole case.

COURT: He can answer the question.

Question read.

A. Yes, we would have immediately been compelled to look to such assets as we could find of the Sullivan Fireproof Partition Company.

Q. Under similar conditions—or do you know what action Ladd & Tilton Bank would have taken—what definite action?

A. They would have commenced suit immediately.

Q. Against the Sullivan Company?

A. Against the Sullivan Company and the Lewis A. Hicks Company.

Q. Do you know whether or not the Sullivan Fireproof Partition Company is or was, on or about—subsequent to May 15th—a solvent and going concern?

A. Subsequent to May 1st, 1912?

Q. Yes.

A. They were insolvent.

Q. Were insolvent?

A. Yes.

Q. Do you know whether or not prior to the 1st day of May, 1912, the Sullivan Fireproof Partition Company was solvent or insolvent?

A. I do not.

Q. Do you know whether or not subsequent to the 15th day of May, 1912—on or about the 15th day of May 1912, the Sullivan Fireproof Partition Company had any assets out of which you could have realized upon an execution for judgment, if you had obtained one?

A. I do not.

Q. Have you made demand upon the Sullivan Fireproof Partition Company, subsequent to the 1st day of May, 1912, for the payment of the indebtedness to the Ladd & Tilton Bank?

A. Read the question.

Question read.

A. Yes, sir, we were asking for these moneys.

Q. And your indebtedness, has it been paid?

A. It has not.

Q. And is unpaid now?

A. Is unpaid now.

Mr. HUNT: I think that is all, if I may recall Mr. Howard later.

Cross Examination.

Questions by Mr. THOMAS::

Mr. Howard, what was your system with the Sul-

livan Company when these moneys were paid into the bank by the Hicks Company? You say that the checks were made payable to the Ladd & Tilton Bank, and you endorsed them without recourse. What happened then?

A. They were handed back to Mr. Sullivan.

Q. What did he do with them?

A. He, I believe, deposited them to his account.

Q. He deposited them to his checking account?

A. His checking account.

Q. And he checked out against these?

A. Yes.

Q. In your bank?

A. In our bank.

Q. When reference was made to liens, the lien time expiring, did you know what kind of liens were referred to at that time?

A. I did not, Mr. Thomas, but I assumed it was the regular building conditions. That term or that inference was used.

Q. Now, Mr. Howard, was it your understanding from that conversation that if the lien time hadn't expired, and liens were filed, that your claim against the Sullivan Company would be reduced to the extent of the liens filed against the building?

A. No. My understanding of that particular situation was that the work had been finished and there were certain moneys ready to be paid Ladd & Tilton, and that after this latter part of April, this lien time would be relieved.

Q. But what I was attempting to ask was that if the liens had been filed in the meantime, prior to the expiration of the supposed period, didn't you understand that the amount coming to the Sullivan Company from the Hicks Company would be reduced to the extent of the liens that might be filed against the building?

A. No. I treated the matter as we do all of those loans to contractors. It is the custom here to advance contractors on architectural acceptance.

Q. Then why were you talking about liens, and fixing an expiration period of May 1st?

A. Because he used that with me. I was urging them to name a particular date at which we would be paid. They asked me for a further release of this \$700.

Q. In other words, their understanding was that they wouldn't be released from liability until after the lien period had expired, and he was supposing that if they paid you then, and liens were filed, that they would have to make a double payment. Isn't that what he had in mind?

A. I don't know what he had in mind, but I was simply fixing a definite date on which we would receive our money, so as to know where this \$700.00 could be realized.

Q. Had not there been some talk prior to that time, Mr. Howard, about the Sullivan Company giving a chattel mortgage upon its plant, or something like that? Was there any talk about that?

A. No.

Q. That thing was never discussed?

A. Never discussed.

Q. Never at any time?

A. I wouldn't have loaned this money but for this acceptance.

Q. I am talking about subsequent to this time?

A. No.

Q. And Mr. Hicks declined to pay?

A. No.

Q. No chattel mortgage proposition?

A. No.

Witness excused.

A. C. SULLIVAN, a witness called by the plaintiff, beign first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. HUNT:

You are Mr. A. C. Sullivan?

A. Yes, sir.

Q. Are you one of the officers of the Sullivan Fire-proof Partition Company?

A. I was, yes.

Q. Well, are you not now?

A. Why, I couldn't say that I am. I haven't considered myself so for some months.

Q. Were you an officer in December, 1911?

A. Yes, sir.

Q. And were you an officer of the company during the months of April and May, 1912?

A. Yes, sir.

Q. Such office being secretary?

A. Yes, sir.

Q. You will please state whether or not the Sullivan Fireproof Partition Company had a contract with the Lewis A. Hicks Company for a portion of the work on the New Lincoln High School in this city?

A. It did, yes.

Q. Whom was that contract originally with, Mr. Sullivan?

A. It was originally arranged with Mr. Lewis A. Hicks.

Q. And who was the sub-contractor?

A. It was in the name of my father, J. D. Sullivan.

Q. You will please state whether or not that sub-contract was assigned by J. D. Sullivan?

A. Yes, sir, it was.

Q. To whom?

A. To the Sullivan Fireproof Partition Company.

Q. And was that with the consent of the Lewis A. Hicks Company?

A. Yes, sir.

Mr. THOMAS: I would state in this connection that the original assignment of Mr. Sullivan to the Sullivan Fireproof Partition Company we have not been able to find, but we are perfectly willing to admit, and I guess the plaintiff is, that it was assigned. We both depend upon that.

Mr. HUNT: Yes.

Q. I hand you what purports to be articles of

agreement between J. D. Sullivan, of Salt Lake City, and Lewis A. Hicks Company, dated the 29th day of April, 1911, and will ask you if that instrument is what it purports to be.

A. Yes, sir, this is the original contract.

Q. This is the original contract?

A. Yes.

Q. This agreement was signed by Lewis A. Hicks, President, and by J. D. Sullivan, by A. C. Sullivan, his attorney in fact?

A. Yes, sir.

Q. Is that your signature?

A. Yes, sir.

Q. A. C. Sullivan Attorney in fact?

A. Yes, sir, for my father.

Mr. HUNT: We will ask to have this in evidence. Marked Plaintiff's Exhibit 7.

Mr. HUNT: The contract is long, your Honor, and I will not attempt to read it. I want to state, however, that the effect of several of the provisions of the contract is that no money shall be due or be deemed earned by the Sullivan Fireproof Partition Company until the claims for labor and material on account of the work done on the contract shall be paid, and that the sub-contractor, Mr. Sullivan, shall render and submit to the contractor, Mr. Hicks, upon his demand or upon certain times, under his hand and seal statements to the effect that a certain amount of work is paid for, or that certain bills are due or owing. I want to state that now, your Honor, for the founda-

tion of certain testimony later on, to the effect that the Lewis A. Hicks Company had ample machinery provided in this contract whereby they could have found that the Sullivan Fireproof Partition Company was in financial trouble at the time that this notification of April 3rd was given, and if they didn't do so, that was negligence, and negligence is as much an element of estoppel as is fraud. Across the face of the contract is written the following: "Approved bond of Surety Co. in sum of \$6000.00 to be furnished before contract is effective, together with certified copy of power of attorney." Signed Lewis A. Hicks.

Q. Will you state whether or not, Mr. Sullivan, the bond as mentioned in that contract was furnished the Lewis A. Hicks Company?

A. Yes, sir.

Mr. THOMAS: We object because that is the bond referred to in the reply that is stricken out. It can't possibly affect this case in any way, so far as I can see. If we are compelled to pay Ladd & Tilton in this matter, we can't collect anything from a bond of that kind. It is a bond that the Sullivan Company should perform the conditions of this contract, pay these men, pay for the material, etc. That is as far as it goes. If we pay Ladd & Tilton, we are not paying them for material furnished or for labor performed under this contract. The fact that they have security makes no difference.

COURT: Let it go in the record subject to objection. I won't take the time to examine it. Just put it

in subject to Mr. Thomas' objection.

Q. I hand you, Mr. Sullivan, what purports to be a bond by the United States Fidelity & Guaranty Company, as surety with the Sullivan Fireproof Partition Company as principal and the Lewis A. Hicks Company, as Obligee, in the sum of \$6000.00, dated the 3rd day of November, 1911, and will ask you to state if that instrument I hand you is what it purports to be.

A. Yes, sir, that is the bond that accompanied that contract.

Q. That is the bond that accompanied the contract?

A. Yes, sir.

Mr. HUNT: I will introduce this in evidence.

Mr. THOMAS: Subject to our objection.

COURT: Subject to Mr. Thomas' objection.

Marked Plaintiff's Exhibit 8.

Q. Mr. Sullivan will you please state at what time or about what time you approached Ladd & Tilton Bank for a loan?

A. I think it was December 17th or 18th, 1911.

Q. And were you asked at that time for a statement of your financial liabilities and assets?

A. Yes, sir.

Q. I hand you plaintiff's exhibit 1, and ask you if that is the statement rendered at that time?

A. Yes, sir.

Q. That was made out by you?

A. Yes, sir.

Q. Did Ladd & Tilton Bank at that time loan you the money you requested?

A. Yes, sir.

Q. Did they require any further security?

A. Yes. I offered them security in the way of an assignment of this building contract, and they accepted that as security.

Q. That assignment was made by you upon the Lewis A. Hicks Company at the request of the bank?

A. Well, they offered us the loan if we would furnish them that security.

Q. I hand you plaintiff's exhibit 2, and ask you if that is the assignment made at that time?

A. Yes, sir.

Q. At the time you applied to the bank for this loan, had you started to fulfill your contract with the Hicks Company?

A. Yes, sir.

Q. For the partition work?

A. Yes, sir.

Q. And how far advanced was your contract at the time, December 18th, the first of these loans?

A. Well, as near as I could say, I would say it was about half finished.

Q. About half finished?

A. Yes, sir.

Q. Do you know, Mr. Sullivan, at what time the Sullivan Fireproof Partition Company finished its sub-contract with the Hicks Company, on that building?

A. Well, it was about the middle of March. We still had a little work to do that took us a few days beyond that.

Q. It was substantially completed the middle of March?

A. Yes, sir.

Q. Did Ladd & Tilton request from you at that time a settlement of your indebtedness?

A. Yes, sir.

Q. Now, will you please just state what conversation was had between you and the bank, at that time, when they demanded the payment of the indebtedness.

A. Well, Mr. Howard had written me and had spoken to me when I was in the bank several times, as to when they would receive their money, and had asked for payment in that way. They wanted the notes taken up.

Q. Did the bank make any insistent claim for the money along about the 1st of April?

A. Well, they made several insistent requests for the money about that time. I can't recall whether there was one made on the first.

Q. Did Ladd & Tilton Bank, along about the 1st of April, demand from you a statement as to what was due or earned under that contract?

A. No, I don't think so. Don't remember of any.

Q. Did you offer to furnish to the bank at that time any statement of the money due, and when it would be paid?

A. Well, I talked it over with Mr. Howard and explained that we were through with the work and that it was probably a matter of only a few days until we would have the balance of the money due. And it was at that time that I made this request for a payment of \$700.00 which—there was a balance of about \$4300.00 due us and we were owing the bank about \$3600.00, and I wanted to take—wanted to receive a payment for the difference in order to pay off some of the accounts that were pushing us at that time.

Q. Did you secure a statement from the Lewis A. Hicks Company as to what amount of money was due you under your contract?

A. Yes, sir.

Q. And at whose request was that statement secured?

A. At Mr. Howard's.

Q. Did Mr. Katz of the Lewis A. Hicks Company prepare that statement?

A. Yes.

Q. Which is marked Plaintiff's Exhibit 6. And Mr. Katz knew that it was prepared for the bank—at the bank's request?

A. Yes, I made a request also to Mr. Katz at first for a payment of this account, and showed him where it was over and above any demand that the bank had, and that I had accounts to about that amount that I would like to pay, and he told me they wouldn't pay anything until—unless the bank would waive on it.

Q. Would waive on what?

A. On whatever amount they should pay. So he went to Mr. Howard, and Mr. Howard told him what he wanted in the way of this letter, naming a period when the balance should be paid.

Q. That is Mr. Katz went to Mr. Howard?

A. Yes, sir, and Mr. Katz later told me what it was that Mr. Howard wanted, and we talked it over in the Hicks Company's office and Mr. Katz prepared this letter, directed to us, stating the amount due us and the amount to be paid.

Q. Was it understood at that time that that letter, the April 3rd notification, was to be handed to Ladd & Tilton Bank?

A. I think it was so understood, yes, sir.

Q. You spoke, Mr. Sullivan, about wishing to have \$700 released to satisfy certain claims. Did the Lewis A. Hicks Company know that you had these outstanding claims of \$700.00 worth?

A. Yes, I told them.

Q. You told them that you had them outstanding?

A. Yes, sir.

Q. And the Lewis A. Hicks Company said they would give this notification dated April 3rd, marked plaintiff's Exhibit 6, if the bank would release the \$700.00, which they would then pay upon that date?

A. Yes, sir.

Mr. THOMAS: That is very leading.

Mr. HUNT: It is subject to that objection but that is the testimony.

Q. You will please state whether or not you know

that the Lewis A. Hicks Company knew that you had unpaid laborers and material-men on account of the work done by you under that sub-contract?

A. Why, I don't know whether or not they knew of all the outstanding accounts we had, but I know that they had received letters from some of them—several of our creditors telling them of the amounts that were owing to them by us.

Q. Those letters received from your creditors by the Lewis A. Hicks Company, and the notification of the amounts due, did they constitute the sum of \$700.00 which you spoke of just a few moments ago, or was it in addition to the \$700?

A. Well, the ones I have in mind are two outside of the \$700.00. That \$700.00 was made up of several invoices that I took down there and showed Mr. Katz how I intended to disburse this \$700.00, and had a list of the names and amounts.

Q. Have you a copy of that invoice with you?

A. No, I don't think I have. I have a list with me—I don't know that I have it here now—that Mr. Katz made of these amounts, and the form of receipt that he wanted me to have each party sign.

Q. Do you know what other accounts—you said you had in mind two others who had filed claims beyond the \$700.00. Do you know who they were?

A. Mr. Wagner of the Hicks Company had told me that the Columbia Contract Company and the Atlas Mixed Mortar Company had both written him, notifying him that we were back in our accounts with

them.

Q. Do you know of any others, Mr. Sullivan?

A. There may have been others. I had those two in mind.

Q. Is the Sullivan Fireproof Partition Company now financially unable to meet its outstanding obligations?

A. Yes, sir.

Q. And was it on or about the month of May, 1912, unable to meet its financial obligations?

A. Yes, it hadn't the ready money to take them up.

Q. Has it withdrawn from business in this state?

A. Yes, sir.

Q. Has it ever complied with the laws of this state relative to foreign corporations?

A. No, sir.

Q. It has no resident attorney in fact?

A. No, sir, none that I am aware of.

Mr. HUNT: That is all for the present if I may recall Mr. Sullivan later.

Cross Examination.

Questions by Mr. THOMAS:

Mr. Sullivan, you say that the Sullivan Fireproof Partition Company is insolvent at this time?

A. Yes, sir, I think it would be considered so.

Q. And that it was unable to meet its financial obligations on the 15th day of May, 1912?

A. Yes, sir, it had no money with which to pay

them.

Q. Was it in any better position on the 3rd day of April, 1912, to pay its obligations than it was on the 15th day of May, 1912?

A. No, I don't think it would be considered so.

Q. You had no more assets to pay your obligations with on the 3rd day of April, 1912, than you had on the 15th day of May, 1912?

A. No, sir.

Q. What was the condition of your assets along in the early part of June, 1912?—Any different from what they were on the 15th day of May, 1912?

A. No, they were about in the same shape.

Q. Be about the same. Then as a matter of fact, Mr. Sullivan, the Sullivan Fireproof Partition Company from the 3rd day of April on was in the same, practically the same financial condition, that is, we will say, up until the middle of June?

A. Yes, it had no more or no less during that period.

Q. Now, Mr. Sullivan, when this \$700.00 release was obtained, what was done by you down at the bank? In other words, I am trying to find out what was done in connection with this \$700.00.

A. Why, I took Mr. Katz' letter to Mr. Howard and asked him whether or not that fulfilled his requirements and he said that it did. I left the letter with him and told Mr. Katz that Mr. Howard was agreeable that he should make a check for Ladd & Tilton for \$700.00 to cover these accounts, and Mr.

Katz gave me their check payable to Ladd & Tilton, and I took it over there to Mr. Howard, and it was passed to our credit.

Q. You checked out against it?

A. We checked out against it and turned in the receipts to Mr. Katz the next day.

Q. Now, you had some talk with Mr. Howard at that time as to the reason for wanting the release of this \$700, didn't you?

A. Yes, sir.

Q. And what did you tell him that you wanted the \$700 for?

A. To take care of small accounts that would aggregate about that amount.

Q. Did you tell him that they were pressing claims?

A. I don't recall whether I did or not.

Q. Did you have any talk with him at that time about the claims?

A. About what time?

Q. About claims due from your company to material men, etc., in connection with the building?

A. About what time was that?

Q. About the time that this letter was given, April 3, 1912.

A. I don't recall whether Mr. Howard and I talked very much about it. I explained my request for this \$700 and showed him that it was over and above the amount that we owed the bank, and that I would like to have these bills paid, but I don't remember wheth-

er or not we talked of the other accounts or not.

Q. Did you ever have any talk with Mr. Howard relating to a chattel mortgage to secure your indebtedness to the bank?

A. Well, I can't remember definitely about that.

Q. Is it your recollection that you had?

A. Well, it seems to me that at some time, in one of my talks with one of the officers of the bank, I suggested something about our machinery not being covered with any—not being any incumbrance, and a chattel mortgage was mentioned in some way, but I can't recall it definitely.

Q. You don't have any idea about when that was?

A. No, sir, I have not.

Q. Now Mr. Howard at the time of this letter, April 3, 1912, was he talking about your paying off your claim at that time to the bank?

A. I don't think so. I went to him after I had a talk with Mr. Katz to find out just what he wanted in the way of this letter.

Q. He knew then at that time, Mr. Sullivan, though that your contract had been completed, didn't he?

A. Yes, I told him.

Q. And he knew at the time this letter was written that there apparently was unpaid on the contract \$4300.00.

A. No, I don't think anyone knew what the amount was.

Q. Well, it specified in the letter.

A. Oh, the amount that was due us?

Q. Yes.

A. I thought you meant the amount we were owing.

Q. No, I meant the amount due to you.

A. Yes, that was determined on by Mr. Katz and myself.

Q. And Mr. Howard knew that of course when this letter was handed him?

A. Yes, sir.

Q. And knew that your contract was completed?

A. Yes, sir.

Q. And knew that you owed them some \$3600?

A. Yes, sir.

Q. Now, didn't you have some talk at that time as to your condition, as to whether you were owing anything on the building, or whether you would be able to pay or not?

A. As near as I can remember we didn't have—or didn't go into those matters until later on; after the time in that letter had expired, when Mr. Howard explained that he hadn't received the money under it and—

Q. (interrupting) That was about May 1st then?

A. Some time after that, yes, sir.

Q. Now, didn't you attempt, at the instance of Mr. Howard, to obtain from Mr. Katz a letter directed to the bank itself in connection with this order—in connection with this turning over of \$700.00?

A. Did I not attempt to get one, you say?

Q. Yes. Didn't Mr. Howard and you request Mr. Katz to give a letter to the Ladd & Tilton Bank, as to the amount due?

A. I don't know whether it was requested to be directed to the bank or to us. Mr. Howard told Mr. Katz, I believe, and Mr. Howard also told me what he would require; it was in the form of a letter to them or to us. I don't remember whether or not it was stated to whom it was to be directed.

Q. Didn't Mr. Katz decline to give any letter to the bank in connection with any amount that might accrue to you people?

A. I believe he—I don't recall as to that, but I know that Mr. Katz hesitated to draw such a letter.

Q. And at this time there was talk about the expiration of the lien period, wasn't there?

A. No, sir, I never spoke of liens with Mr. Katz or any one else in his office.

Q. You didn't hear Mr. Katz and Mr. Howard talk about the possible expiration of the lien period?

A. No, sir, I wasn't there.

Q. Let me ask you this: Didn't either you prepare or didn't Mr. Howard prepare a letter to be submitted to Mr. Katz, and which was submitted to him, which he declined to sign, and he prepared one himself?

A. Yes Mr. Katz told me of this talk with Mr. Howard and of what Mr. Howard wanted. He hesitated to write the letter, and I think I told him that I would write a letter including what I thought Mr.

Howard wanted, and as near as I remember, I did write a letter, a form to cover what I thought the bank would want.

Q. So you wrote the letter?

A. No, sir, I did not. I wrote a form, a different form altogether.

Q. Yes, that is what I referred to.

A. I didn't write the letter, though, the one—

Q. (interrupting) I am not talking about the one that was signed, Mr. Sullivan. I am talking about the other one that Mr. Katz refused to sign. Did you write that or did Mr. Howard write it, or who wrote it?

A. No, I wrote it.

Q. And he declined to sign that?

A. No, he didn't decline to sign it. He wrote one of his own.

Q. Why didn't he sign the letter that you had written?

A. Well, as nearly as I remember, it was merely a—I don't know that it was fit to be signed. It was a form to cover what I thought Mr. Howard wanted, as Mr. Katz didn't seem to understand what he did want.

Q. Wasn't this the object, Mr. Sullivan: Mr. Katz didn't want to put his company in a position of binding themselves to pay the bank any specific sum? Wasn't that his whole object in attempting to write this?

A. I don't know what his object was.

Q. Was there any talk about that?

A. Well, he did say something about not knowing whether or not it would be right for him to—

Mr. HUNT: Just a moment: If your Honor please, unless Mr. Howard or some officer of the bank was present, this conversation would be immaterial. I want everything in and open.

COURT: I think the circumstances under which the letter was written are pertinent.

Mr. HUNT: It is, but unless this conversation, where Mr. Katz says he was restricting his liability, was in the presence of the bank officers, I doubt its materiality.

Mr. THOMAS: There was testimony on behalf of Mr. Howard in connection with the lien period, and it seems to me it is pertinent to find out what the parties' intention was.

Mr. HUNT: Save an exception.

A. What is the question?

Question and answer read as follows: "Wasn't this the object, Mr. Sullivan: Mr. Katz didn't want to put his company in a position of binding themselves to pay the bank any specific sum? Wasn't that his whole object in attempting to write this? A. I don't know what his object was. Q. Was there any talk about that? A. Well, he did say something about not knowing whether or not it would be right for him to—"

Q. That is, you were about to say that he was hesitating about writing any letter. Is that the idea?

A. Well, no. He spoke as if he thought it were a matter that should be handled by some one else of his company, but I believe at the time he was in charge of the office.

Q. Do you remember, Mr. Sullivan, how the amount of the unpaid claims of the various material-men furnishing stuff to you upon this building is—what the amount is?

A. Somewhere about \$4500.00.

Q. About \$4500.00. Have you, Mr. Sullivan, your books here indicating the amounts that are due to the various claimants?

A. Yes.

Q. I will ask you to produce them. (Witness gets books.) What book is that you have, Mr. Sullivan?

A. I call it a ledger.

Q. Call it a ledger. Who made the entries in that book?

A. I did.

Q. So that the entries therein are from your own personal knowledge?

A. Yes, sir.

Q. And they were not entered by anybody else?

A. No, sir.

Q. Is there anything in there, Mr. Sullivan, in connection with the claim of Roeblings's Sons Company against the Sullivan Fireproof Partition Company?

A. Yes, sir.

Q. Will you state what the Roeblings' Sons Com-

pany furnished to you, if anything, that caused that charge to be put in that book?

Mr. HUNT: I desire at this time to enter an objection to this line of testimony. In the first place, it isn't proper cross examination. If Mr. Thomas wishes the testimony, he should make him his own witness for that purpose, for it isn't proper cross examination. But more properly, I don't think it is material to any issue made in this case, what the amounts are, and what they were incurred for. The fact is he has pleaded there was due from the Sullivan Company about \$4500, which he is attempting to offset on the amount due Sullivan for his work. Now the issue as to that can be determined without going into the ledger and entries made on the books for work and labor performed, and to what people. The chief examination, as I intended to make it, only went to the point, Did Lewis A. Hicks have knowledge that there were unpaid creditors of Sullivan at the time of the notification of April 3rd. The witness testified that they did have that knowledge. Now, I consider the only material point that can be asked on cross examination—did they or did they not have that knowledge.

COURT: There is an issue in this record, as I understand it, as to the amount due these labor and material men on the Sullivan contract.

Mr. HUNT: I don't believe there is. I didn't intend there should be such a one, for this reason: Lewis A. Hicks Company hasn't got to pay a cent of

money out under this work. If they don't have to pay there is no issue upon that, because as the case now stands before your Honor, Sullivan entered into a contract with Hicks, and he gave a bond with good and sufficient surety to pay—

COURT: That isn't material. The answer sets up certain things. Now, do you deny in the reply or admit it?

Mr. HUNT: Deny in the reply.

COURT: Counsel has to prove it.

Mr. HUNT: But can he prove on cross-examination of a witness who hasn't testified to it, in chief?

COURT: Can't do it on cross examination. (To Mr. Thomas.) If you want to make him your own witness, you can do that.

Mr. THOMAS: I suppose when it comes to our case, that is the proper time to do that.

COURT: It is not proper cross examination, of course.

Mr. THOMAS: The only point we had in the matter was Mr. Sullivan lives in Salt Lake, and we were not absolutely sure what we would be able to prove by him, and we have asked all these claimants to come here and prove these claims, and they are sitting around, waiting, and if counsel would—

COURT: You can make him your own witness now, if you desire to do so and put that testimony in.

Mr. THOMAS: Then we had better do that, to save these people coming in. We will make him our witness.

Direct Examination.

Questions by Mr. THOMAS:

What were the things that Roebling & Company furnished to you in connection?

A. There was re-inforcing wire.

Mr. HUNT: I wish to enter another objection to this testimony at this time, for the reason that it is incompetent, immaterial and irrelevant. I believe the rule of law is that parties cannot make an issue of a irrelevant matter. I might have set forth in my complaint that the Battle of Waterloo occurred at a certain date, and Mr. Thomas deny it, and that would make no difference in the issues of this case. Whether or not it is an issue is determined by whether or not it is material. I didn't move to strike the answer because it contained certain things I wanted in there at the time of this trial. If it is immaterial, you can't make it material by denying it. The point in this case, to my mind is this: Ladd & Tilton Bank has an assignment, given and accepted by the Hicks Company

COURT: Taken subject to the contract—

Mr. HUNT: Taken subject to the contract, but it is shown they had no knowledge of the contract.

COURT: I will let the testimony in, subject to your objection.

Q. (Mr. THOMAS) Now, what do you say the stuff was that Roebling Sons Company furnished?

A. It was reinforcing wire.

Q. Where was that used?

A. It was used in making these blocks.

Q. Blocks for what?

A. Partition blocks.

Q. Partition blocks. Where were the partition blocks used?

A. In the partition work at the Lincoln High School, and other places as well.

Q. What was the amount of the claim of Rocklings Sons?

A. It totalled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

Q. I will call your attention to the claim of the Acme Cement Plaster Company. Will you look at the book and see if there is anything there in connection with the Acme Cement Plaster Company?

A. Yes, sir. The book shows we are owing them \$836.55.

Q. What was that for?

A. That was for plaster.

Q. Where was the plaster used?

A. It was used in making blocks.

Q. And those blocks were used in the Lincoln High School?

A. Lincoln High School Building.

Q. Has this sum of \$836.55 been paid?

A. No, sir.

Q. That is still due the Acme Cement Plaster Company?

A. Yes, sir.

Mr. HUNT: Just for the purpose of the record. I don't believe that this is a defense now as to this plaster company unless he shows that Hicks Company has paid them. He hasn't suffered any damage yet.

COURT: He claims he is liable under his bond and under the contract.

Mr. THOMAS: And under the statute.

Mr. HUNT: Here is a contingent claim, we don't know the merit of it. Let him prove what he has actually suffered in damage; that is a different proposition. It has been held that the payment of claims is a complete defense, but non-payment of claims is immaterial and cannot be offered.

COURT: I will consider that on the merits of the case when the testimony is all in.

Mr. HUNT: Save an exception.

Q. That was for material furnished and used in the Lincoln High School Building?

A. Yes, sir.

Q. Now, will you refer to the Atlas Mixed Mortar Company.

A. We are owing them \$121.30.

Q. What for?

A. For sand and hauling.

Q. In what connection?

A. The Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Portland Quarry Company.

A. We are owing them \$134.00 for hauling away rubbish from the Lincoln High School.

Q. Hauling rubbish away from the Lincoln High School?

A. Yes, sir.

Q. In connection with your contract there?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the Columbia Contract Company.

A. We are owing them \$114.08.

Q. For what?

A. For sand furnished to the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Columbia Hardware Company.

A. We owe them \$30.22, as near as I was able to figure it out on the Lincoln High School. We bought hardware from different firms, and a part was delivered to our place on the east side, but as near as I could segregate it, we owe them \$30.22 on the High School.

Q. Do you happen to know the full amount you owe the Columbia Hardware Company?

A. We owe them in addition to the \$30.22—we

owe them \$72.33.

Q. But that is not connected with these?

A. No connection with the school.

Q. Has that \$30.22 been paid?

A. No, sir.

Q. I call your attention to the claim of the East Side Transfer Company.

A. We owe them \$75.65.

Q. What is that for?

A. For hauling.

Q. Hauling of what?

A. Hauling blocks.

Q. To the Lincoln High School Building?

A. To the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of E. Hippeley.

A. That is still owing, \$32.35.

Q. What was that for?

A. That was for the rent of motors and some repair work, some wiring.

Q. In the Lincoln High School Building?

A. In the Lincoln High School, yes, sir, incidental to this contract.

Q. Incidental to this contract. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Northwest Door Co.

A. We are owing them \$51.05.

Q. What was that for?

A. For some wood parts for our machinery as used at the Lincoln High School.

Q. What was that? Just explain so we can understand.

A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

Q. These blocks were hollow; is that the idea?

A. They were hollow and these wood cores were used for making that hollow part; after these blocks are molded in a machine, they are taken out and the wood cores were knocked out.

Q. Those are necessary things in the construction of these blocks?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Oregon Transfer Company?

A. We are owing them \$72.75.

Q. What was that for?

A. For hauling at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Portland Machinery Company.

A. We are owing them \$47.85. That is for—I think it was a fan and some dry kiln trucks used in

the operation of drying the blocks.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

A. We owe them \$26.80 for power, and \$26.10 for lights at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of George B. Rate.

A. We owe them \$13.75 for some plaster hair.

Q. Plaster hair?

A. Yes, sir.

Q. Was that used at the Lincoln High School?

A. Yes, sir. I think it was; as near as I can tell it was.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Union Oil Company.

A. We are owing them \$78.25.

Q. What was that for?

A. That is for coal oil furnished at the Lincoln High School.

Q. How was it used?

A. It was used as a sort of lubricant in knocking out these cores.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Western Lime & Plaster Company.

A. We owe them \$1285.91.

Q. What was that for?

A. For plaster.

Q. Used at the Lincoln High School Building?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of Wright & Branch.

A. Wright & Branch—we owe them a balance of \$1400.00.

Q. A balance of \$1400.00?

A. Yes, sir.

Q. For what?

A. It is a balance due them on a sub-contract that they took from us for erecting partitions.

Q. In the Lincoln High School Building?

A. In the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the United States Steel Products Company.

A. We owe a balance of \$150.00.

Q. What was that for?

A. That is for wiring—wire—reinforcing wire.

Q. That is used in these blocks? A small wire?

A. A small chicken wire.

Q. Used as a reinforcement?

A. Yes, sir.

Q. That was used in these blocks used in the Lincoln High School?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I will ask you, Mr. Sullivan, whether you are familiar with the value of these materials furnished and the labor performed in connection therewith, as to all of these items that you have just testified to?

A. Am I familiar with the values?

Q. Yes, with the values that you should have paid for these materials that were furnished you, and for the labor performed. In other words, whether these amounts are reasonable for the materials furnished and the labor performed?

A. Yes, sir, there were no differences between us on prices of any of the materials.

Q. I will ask you then if these amounts you have specified were the reasonable value for the various materials furnished, and the labor performed in connection therewith?

A. Yes, sir.

Q. What is the aggregate of them, do you know?

A. I have it in with some others here. I think it is \$4496 and some cents.

Q. Yes, \$4496. And that you consider the reasonable value of this material furnished and—

A. Yes, sir.

Q. (continuing) and labor performed that you

have testified to; materials and labor that you were required to furnish under your contract with the Hicks Company?

A. Yes, the most of it. There was a considerable amount of these moneys expended that, at the time the contract was signed, were not supposed to have been expended, brought about through the negligence of the Hicks Company in delaying that building. We were supposed to have gone on there—it was the first of July, and the building was allowed to drag, through non-delivery of steel I believe was the excuse—anyway so that we didn't get on there until about the 1st of October, which made it necessary for use to expend all this money, in drying all this material, which otherwise wouldn't have been necessary.

Q. But these materials that were used though were the materials that you would naturally have to furnish in connection with the contract that you entered into?

A. Naturally under the conditions as we found them when we started, but not when we signed the contract.

Q. What do you mean? Do you mean you had to furnish additional materials to go in up there you wouldn't have furnished?

A. Yes, sir.

Q. What material?

A. You see when we figured this building, Mr. Hicks and myself, in San Francisco, he told me that the building would be ready for us early in the sum-

mer, which made it possible for us to figure on air drying our material, making it and drying it in the open, which would have done away with running steam dry kilns, but the building didn't come along, as it happened, so we could go on it until the 1st of October, and it made it necessary for us to run all winter, while it was pretty wet.

Q. That was only a question of time, wasn't it? You didn't have to use any more material, did you?

A. No, but we had to use a whole lot more heat and building a dry kiln.

Q. But there is nothing in this in connection with a dry kiln.

A. Yes, sir.

Q. What is it?

A. Well, there is the trucks and—well there is in this—I don't know that many of these items here referred to it, but a great many that were paid; we had to pay out in the neighborhood of a thousand dollars for fuel that otherwise wouldn't have been expended.

Q. None of those in these unpaid items?

A. Those are all paid.

Q. What I am getting at is the materials that have gone in here are in quantity the same under any conditions, are they not?

A. Oh, yes.

Q. You didn't have to use any more wire, and you didn't have to use any more plaster, or sand, or hair, or anything like that?

A. No.

Mr. THOMAS: I think that is all.

Cross Examination.

Questions by Mr. HUNT:

Will you just turn to that book, the pages you had there, Mr. Sullivan, please.

A. Yes, sir.

Q. The Acme Cement Plaster Company, you testified for certain material. What was it? I couldn't understand.

A. That was plaster.

Q. And what was the Atlas Mixed Mortar Company?

A. That was sand and hauling.

Q. That was sand and hauling?

A. Yes, sir.

Q. Can you segregate the two items?

A. Well, hardly, I should say about half and half.

Q. About half and half?

A. That is a guess, though.

Q. And the Portland Quarry Company.

A. That was hauling the rubbish away from the building, broken blocks and the refuse from the floors.

Q. And the Columbia Contract Company?

A. That was for sand.

Q. Any transportation charges in that?

A. What? Hauling to the building, do you mean?

Q. Did they have any transportation charges in this amount you have here?

A. That included the cost of the sand delivered at the High School.

Q. And the Columbia Hardware Company?

A. Why for various forms of hardware we bought from them. Used tools of various kinds.

Q. Tools?

A. Tools, and—oh parts of machinery and parts of boilers and such as that.

Q. That was a part of your permanent equipment and plant, was it not.

A. Part of it was, yes.

Q. Did any part of that enter into the construction of the building?

A. No, the tools were only used in carrying out the work of construction, and the parts of the boilers were used in the boilers in the drying of material.

Q. Who purchased from the Columbia Hardware Company?

A. From them?

Q. Yes.

A. There was a foreman.

Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

A. Yes, sir.

Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the material used in making the blocks. This motor was used in driving that mixer.

Q. You rented a motor from him?

A. Yes, sir.

Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

Q. That was a part of the manufacture of the block, was it not?

A. Yes, a part of the process of making the block.

Q. Now the Oregon Transfer Company was for hauling?

A. Hauling, yes.

Q. Hauling the blocks?

A. Hauling the blocks to the building.

Q. Hauling the wood blocks or the plaster blocks?

A. No, the plaster blocks?

Q. The Portland Machinery Company I believe you said was for dry kiln trucks.

A. Dry kiln trucks, and I think for a fan, if I remember right.

Q. These trucks, just common trucks to put stuff on to carry around?

A. They call it a dry kiln truck; it is used as a part of a car that goes into the dry kiln to carry blocks.

Q. And the fan, what is that?

A. I am not so certain whether their bill included that fan, or whether or not we paid for it. We had a fan and bought it from them. I can't recall whether or not it was paid for.

Q. Then if this bill of \$47.85 does not include the fan, it is all for trucks?

A. Yes, sir, I think that is all we bought from them.

Q. Where are those trucks now?

A. They are over here in a basement where part of this machinery is.

Q. Part of your plant—part of your equipment, are they?

A. They are now, yes.

Q. They were then?

A. They were used as part of the equipment, yes.

Q. Now, the Portland Light & Power Company has a bill of \$52.90 for power and light. What was that power furnished for?

A. To drive the motor.

Q. To drive the motor?

A. Yes, sir.

Q. What motor—the Hippeley motor?

A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

Q. And the light was what?

A. Lights used around the place where we were working.

Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it

not?

A. Yes, sir.

Q. George B. Rate, he furnished plaster hair, is that it?

A. Yes, sir.

Q. Plaster hair?

A. Yes, sir.

Q. Wright & Branch had a sub-contract for placing the partitions?

A. For placing the partitions.

Q. And the United States Steel Products Company for reinforcing?

A. For wire.

Q. Reinforcing wire?

A. Yes.

Q. Is there any man on this list, Mr. Sullivan, who furnished any material directly that went into the building, or wasn't the material that was furnished, furnished the Sullivan Fireproof Partition Company to be afterwards manufactured into stuff that went into the building?

A. The only thing that actually went into the construction of this building as far as we were concerned were these blocks.

Q. That is the thing you manufacture?

A. Yes, sir.

Q. That is the thing you agree to furnish in your contract?

A. We agreed to furnish and erect them.

Q. And erect them?

A. Yes, sir.

Q. And the stuff you speak of here was sold to your company individually in the course of your manufacture?

A. This was all sold to us to be used in making these blocks—I think, without going over each item.

Q. And do you know whether or not any material was furnished by these parties that went into blocks, which blocks were placed in any other buildings and other places, other than the Lincoln High School?

A. Yes, we had a surplus number of blocks from the school that were taken away and used on the Smith Hotel Building.

Q. Where is that?

A. I think called it Sixth and Main, if I remember right.

Q. That is in the City of Portland?

A. City of Portland, yes, sir.

Q. About how many was that, do you know?

A. Probably about ten thousand feet.

Q. About ten thousand feet?

A. Yes, sir.

Q. And I want to be perfectly sure that a portion of the material that you have testified to here went into these blocks that went into that Hotel at Sixth and Main.

A. Well, how we come to have these, in making blocks that we used in this school, in our machines we get three of the size used in the school and one smaller size, a three inch block used in ordinary par-

titions, and we had no use at the school for any number of these three inch, such as we would have in making a six inch. We had to provide a place of putting them; it was considered sort of a waste, that is, as far as the school was concerned, so we got this Smith job and hauled a considerable number there, but we were afterwards stopped from doing that by the Hicks Company and the architects, so that we finished up delivering to that building from our place on the East Side.

Q. Now, where was your plant on the East Side?

A. At East Water and Morrison.

Q. At East Water and Morrison. Where was this material delivered?

A. Material delivered to all these different places, but that I have mentioned was all delivered to the Lincoln High School as far as I checked them off.

Q. Was delivered to the Lincoln High School?

A. Yes, sir.

Q. Did you have a manufacturing plant there?

A. Afterwards—Oh, at the Lincoln High School?

Q. Yes.

A. Yes, we made our material right in the school building in the basement.

Q. I see. Then the stuff you have mentioned here was delivered at the High School?

A. Delivered at the High School.

Q. And there manufactured by you in your own plant?

A. Into blocks.

Q. Into blocks?

A. Yes, sir. We owe a number of these people, these same people other accounts, that I haven't considered as being included in the High School material—delivered at the East Side.

Q. How have you segregated it?

A. I mean I have only included in there materials that I knew had gone to the High School; materials that were delivered to us by these different people to our place on the East Side, I haven't included in these amounts. That is, tried to keep them separate as near as I could.

Q. But you are not sure that they are separate, are you?

A. Fairly sure, yes. I might have overlooked one or two.

Q. Now you say, you testified that the Roeblings' Sons Company's claim is the only one that has been paid.

A. Yes, of those we have mentioned.

Q. Do you know that that was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they told you?

A. Yes, Roebling never told me.

Q. You don't know of your own knowledge it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

O. Simply from what they told you, though?

A. Simply from what I heard from them—not

that you had these accounts?

A. I don't remember that.

Q. When you say then that you thought that Mr. Howard knew of several large accounts, you are just guessing from inference?

A. It was an assumption at the time, yes.

Q. An assumption which was not warranted by any statement of yours or Hicks?

A. Not that I remember of now.

Q. You wouldn't say positive would you, Mr. Sullivan, that you offered Ladd & Tilton Bank a chattel mortgage?

A. No, I wouldn't. I have tried to recall that, but I don't remember how that came up or whether it came up through Mr. Howard and myself or through some one else.

Q. Might have been some other creditors?

A. Very likely might have been.

Q. In the face of Mr. Howard's positive testimony no chattel mortgage was offered Ladd & Tilton Bank, would you state now it was?

A. No, sir, I would state now it wasn't if Mr. Howard says so. I know that at some time or other a chattel mortgage was spoke of with some one, but I can't say positively it was Mr. Howard or any officer of the bank.

Q. Did the bank request that that notification dated April 3, 1912, be addressed to itself, or did it just simply say that a notification be given of a certain amount due and when it would be paid?

A. I think that was the way the request was made; that a letter be written stating the amount due us, and when it would be paid.

Q. Did Mr. Katz of the Hicks Company know that that letter was going to be delivered to Ladd & Tilton Bank?

A. Yes, sir.

Q. And did he know that it was upon the strength of that letter and the information therein contained that Ladd & Tilton Bank was going to release \$700.00?

A. Yes, sir.

Q. How many of these claims that you have testified about did the Lewis A. Hicks Company, or any of its agents, know at the time of April 3, 1912—that you know they knew of?

A. Well, at different times when I was in the office, Mr. Wagner or Mr. Katz would speak to me about having received letters from different people. Now, I remember distinctly him telling me that he had heard from the Columbia Contract Company and the Acme Mixed Mortar Company and one day gave me a letter or showed me a letter from Mr. Thomas of the School Board calling attention to an account that had been presented to them; it was one of the plaster accounts, I don't remember whether the Western Lime & Plaster or the Acme Cement Plaster.

Q. One of the big plaster contracts?

A. Yes, sir.

Q. Did you ever generally inform the Hicks Com-

panty prior to April 3, 1912, that you were in financial difficulties?

A. Oh, no. Mr. Wagner and I spoke of it. I think he knew fairly well what condition we were in about that time.

Redirect Examination.

Questions by Mr. THOMAS:

You used an expression, "10,000 feet" in connection with blocks a while ago. Having that in mind how many feet went into the Lincoln High School Building?

A. I think it was 130,000 feet.

Q. That would make 140,000 feet that you constructed altogether up there?

A. Not up there, no, sir. A part of these were later made at the East Side but delivered to the High School.

Q. You mean a part of the 10,000?

A. No, a part of the 130,000. You see we had to get out of the building because the place where we were working had to be finished and we were in the way, and we took our machinery over to the East Side, and started to making blocks there to finish the school as well as to take care of any other work we should get, and we hauled over several loads from the East Side to the school to make up the 130,000.

Q. But the 130,000 feet went into the building?

A. I believe that is the amount we determined on, yes, sir.

Recross Examination.

Questions by Mr. HUNT:

A part of this hauling expense you testified to is hauling from the East Side?

A. I don't remember whether I included that in the amount in the school, or whether I left it on open account. I have two open accounts with the Oregon Transfer and the East Side Transfer. I couldn't say whether or not I included that.

Q. Mr. Sullivan, was any of the material at all which was furnished to you to create into plaster blocks, furnished to any other place—other than the premises of the Lincoln High School?

A. That was used in making blocks to be put in the High School?

Q. Yes.

A. Yes, it was delivered over on the East Side. Over at East Water and Morrison Streets.

Witness excused.

Mr. HUNT: If your Honor please, I ordered a certified copy of complaint and record in a case filed in the Circuit Court of this state, entitled *Lewis A. Hicks Company vs. Sullivan Fireproof Partition Company and the United States Fidelity & Guaranty Company*, and I have subpoenaed the Deputy County Clerk to appear and identify the record. The purpose of that is—I have pleaded in my reply that the Hicks Company made an election as between these people from whom they are going to ask this money, and I want

the introduction of that record to show that election. It is not here yet. If we may rest with permission to offer that later, I will now do so.

Plaintiff rests.

Mr. THOMAS: I desire to offer in evidence contract between the Lewis A. Hicks Company and School District No. 1. I offer it in this informal way for the reason that the pleadings admit the execution of the contract.

Mr. HUNT: We wish to object as incompetent, immaterial and irrelevant and not an issue in this case.

COURT: It will be admitted.

Mr. HUNT: Save an exception.

Marked Defense Exhibit A.

Mr. THOMAS: I don't attempt to prove any of the pleadings. The defendant admits paragraph 6: "Admits that in connection with said contract the above named defendant executed its bond as principal in favor of said School District No. 1 with the Pacific Coast Casualty Company as surety thereon, but denies any knowledge or information as to whether or not the bond set forth in the said paragraph 6 is a true copy of said bond and the whole thereof.

Mr. HUNT: I admit that. My only point is you can't make an issue of an immaterial fact.

Mr. THOMAS: I desire to offer in evidence the bond executed by the Lewis A. Hicks Company and the Pacific Coast Casualty Company to School District No. 1. In the pleadings the execution of the

bond is admitted but they deny any knowledge or information as to whether or not it is the bond set forth in paragraph 6. I offer this in evidence at this time and ask leave to substitute, as the School District is desirous of keeping this bond. I ask leave to substitute a copy.

Mr. HUNT: Same objection.

COURT: This is a copy of the original—copied in the pleadings?

Mr. THOMAS: Yes.

COURT: Why not admit that is a correct copy?

Mr. HUNT: That is all right.

COURT: It is not necessary to encumber the record.

Mr. THOMAS: Very well.

FRED A. KATZ, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. HUMPHREYS:

Mr. Katz, did you write a letter on behalf of the Lewis A. Hicks Company to the Sullivan Fireproof Partition Company, on April 3, 1812?

A. I did.

Q. I hand you Plaintiff's Exhibit 6 and ask you to state whether you have seen that letter.

A. Yes, this is it.

Q. That is the letter you wrote?

A. Yes, sir.

Q. Just tell us in detail the circumstances leading

up to your writing that letter.

A. Why, Mr. Sullivan came in the office one day and wanted a letter to the bank saying how much money was due him and when it would be paid. I told him I wouldn't give it to him; didn't want to lay the Hicks Company liable for any moneys, and he went away and came in the next day and asked me for it. He said he wanted \$700.00, at least about \$700.00 to pay some small creditors, and I again refused. Mr. Sullivan left and then he must have gone to see Mr. Howard, as he came back and told me "if you will go and see Mr. Howard, it will be all right." I went over and seen Mr. Howard and told him the circumstances, and Mr. Howard wanted us to write a letter to him.

Q. When you say you told him the circumstances, what do you mean by that?

A. I told him he had about \$4300 or \$4400.00, I couldn't say exactly, coming to him. He owed considerable money on the job, I couldn't say exactly how much, and he wanted six or seven hundred dollars to pay some small bills.

Mr. HUNT: Who was that conversation with?

Q. Mr. Howard. Was anything said at that time about the period for mechanic's lien?

A. He wanted a letter and I said I couldn't give a letter.

Q. You say he wanted a letter?

A. Mr. Howard.

Q. Mr. Howard wanted a letter?

A. Yes, sir.

Q. Yes, and—

A. (interrupting) And I told him I couldn't give him a letter; there was certain bills outstanding and I didn't know who was going to lien on the job, or not. So he wouldn't release—he told me he wouldn't release the \$700. I says "All right." Then I went back to the office and Mr. Sullivan came in the next day, and he wanted a letter in the worst way, telling me that Sullivan's creditors were pressing him, so I says: "What kind of a letter do you want?" He said, so I rang for the stenographer and she came in and sat down and he dictated a letter, and I said no, I wouldn't sign that, so, "well," he says, "give me something." I says "I will give you something that won't incriminate the Hicks Company. I won't address it to the bank, but will address you a letter" and I wrote this to him. That is all there was to it.

Q. What did you mean by incriminating the Hicks Company?

A. I didn't want to lay them liable for any money.

Q. Did you and Mr. Howard discuss the effect of any liens on the amount that would be due from the Hicks Company?

A. Well, I gave him to understand that the liens would have to come first if there were any filed, that is would have to be paid first.

Q. What is your position with the Lewis A. Hicks Company—what was it at that time?

A. Cashier.

Mr. HUNT: You don't mean to say you deny his authority to give this?

Mr. HUMPHREYS: No, no, no question about that at all.

Cross Examination.

Questions by Mr. HUNT:

Mr. Katz, when was this conversation with Mr. Howard that you speak of?

A. Well, that order was signed on April 3. It must have been April 1st or April 2nd. I couldn't state positively.

Q. Where did the conversation take place?

A. In the Ladd & Tilton Bank.

Q. How did you happen to go there?

A. Beg pardon?

Q. How did you happen to go to Ladd & Tilton Bank?

A. Mr. Sullivan requested me to go and tell him—and see him, and said I could get the seven hundred released for his creditors.

Q. You knew that he had this seven hundred that he wanted to pay off right away, didn't you?

A. I don't know whether he said seven hundred exactly, but it was approximately that amount that he wanted to pay. They were pressing him very hard.

Q. You say it was not your intention to make any binding obligation on the Hicks Company by writing that letter. That is what you said, isn't it?

A. Yes.

Q. But you did state that the contract had been completed, didn't you?

A. Yes, sir.

Q. You knew that it was completed?

A. Yes, sir.

Q. And you said that there was a balance due of \$4300.00, didn't you?

A. Yes, sir.

Q. And you said it would be paid on or about May 1st?

A. Yes.

Q. You made no reservations about liens, as you call it, or any other labor claim, did you?

A. No.

Mr. THOMAS: That doesn't say will be paid; says will be due.

Q. Did you know, Mr. Katz, that Sullivan had other unpaid creditors—other than those represented in this \$700?

A. Yes, sir.

Q. At the time of this notification of April 3rd?

A. Yes, sir.

Q. Did you know that they had priority and would have to be paid?

A. Did I know what?

Q. That they had priority and would have to be paid?

A. Prior orders?

Q. Priority. Didn't you know they were first in the law and would have to be paid before anybody

Bank but to Mr. Howard—instructed to deliver that to him personally?

A. I didn't deliver that to anybody, no.

Q. No, but you were to deliver it to him personally, weren't you, Mr. Howard of Ladd & Tilton Bank?

A. I don't know. I don't remember who I was to deliver it to.

Q. Did you take the check yourself over to the bank?

A. Yes, I was to deliver it to Mr. Howard.

Q. And when you went into the bank, was Mr. Howard there?

A. No.

Q. And did you leave the check?

A. No, I didn't leave the check.

Q. Took it away with you?

A. Yes, sir.

Q. Do you know about what time that was, Mr. Katz?

A. What time of day?

Q. No, about what day of the month or in what month?

A. I couldn't say.

Q. Was it in April or May?

A. It might have been; might not have been; I couldn't say.

Q. Might have been what?

A. Might have been April, or May, or June. I don't recall right now.

Q. But it was after April 3rd, wasn't it?

A. Yes, it was after April 3rd.

Q. And it was done with the knowledge that Sullivan had still these outstanding claims, wasn't it?

A. Hicks told me to take it up there; that is all I know.

Q. Hicks did himself?

A. I believe it was Hicks. I couldn't say positively. I got orders from somebody.

Q. Now, Mr. Katz, it was always your understanding—see if this isn't true—it was always your understanding that all the money which Sullivan earned under his contract was to be paid to Ladd & Tilton Bank?

A. Was to be through them, yes.

Q. Yes, to be paid through Ladd & Tilton. Was to be paid in checks drawn to the order of Ladd & Tilton Bank?

A. Yes, sir.

Q. And that money was to be paid to Ladd & Tilton Bank irrespective of the claims of any one else. Is that your understanding?

A. No.

Q. What was your understanding about that, Mr. Katz?

A. The \$700.00—Sullivan—that—when I made that check out, I gave it to them with the distinct understanding it was to be paid to his creditors.

Q. Drawn to his orders?

A. Ladd & Tiltons.

Q. Your understanding was that Sullivan was to get some of that money that was to be paid to Ladd & Tilton Bank?

A. Yes, but—

Q. I am not trying to get anything wrong; I am trying to get the facts of the matter. I think a great mistake has been made, and I want to see if it is true. Your understanding of this whole business was that by virtue of this assignment given to Ladd & Tilton Bank by Sullivan and accepted by Hicks, through your Mr. Wagner, that all the moneys earned by Mr. Sullivan under that contract, was to be paid through Ladd & Tilton Bank?

A. Yes, sir.

Q. That was your understanding?

A. Yes, sir.

Q. And it was also your understanding that that was to be paid through Ladd & Tilton Bank, irrespective of the fact that any labor or material men had a claim on Sullivan's money, because of labor or material furnished?

A. No.

Q. What was your understanding of that?

A. It was to be paid to them provided the Sullivan Company got it. For when I gave Sullivan this check—I gave him check for \$700.00—I told him to bring in receipts; I made out receipts for the bills he was to pay it for, and in the morning—he said he would have them here by ten o'clock; I said "All right, if you don't, I will stop payment on the check"

and he didn't have them in there by ten o'clock and I went and stopped payment on the check.

Q. What check are you speaking of now?

A. Check I gave him for seven hundred odd dollars—seven hundred one, something like that.

Q. That was made payable to Ladd & Tilton Bank?

A. Yes.

Q. You don't quite understand my meaning. What I wanted to understand was this: Your interpretation of the relation which existed between Sullivan and Hicks and the Bank. I want to understand just what you thought that relationship was. Did you feel that at all times the money which Sullivan earned must be paid to the bank, irrespective of any labor or material men's claims?

A. No.

Q. Let's take this example and see if you understand what I mean.

Mr. THOMAS: I think that is subject to objection.

COURT: Let him go ahead with it.

Mr. HUNT: I think a mistake has been made, and if so it is as much to his credit as ours.

COURT: His interpretation of the contract wouldn't be binding.

Q. Let us just take for illustration: Your Hicks Company—you are Mr. Hicks; you have a thousand dollars in your hand that has been assigned to Ladd & Tilton Bank by Mr. Sullivan as was done in this

case. Now, the Acme Plaster Company has a claim for a thousand dollars for material furnished to the Lincoln High School, which was the thing Mr. Hicks and yourself were building. You had a thousand dollars in your hand and you wanted to pay it to somebody. "I owe it; somebody has earned it for the work has been done. Here is Sullivan, he has assigned it to Ladd & Tilton Bank, so he is not entitled to it. Here is Ladd & Tilton Bank who hold the assignment, and here is the Acme Plaster Company who furnished material." Now, who would you have paid that thousand dollars to if such a contingency had arisen?

A. If the thing was O. K. would have paid to Ladd & Tilton Bank.

Q. Would have paid to Ladd & Tilton Bank?

A. Yes.

Q. That is what I thought. That is what I understood your interpretation of the contract would have been. Now, Mr. Katz, just one more question: You understood, did you not at all times, particularly when you wrote this letter of April 3rd, 1912,—you understood that the money which Sullivan had earned, and which would be paid under his contract, would be paid to Ladd & Tilton Bank?

A. Yes.

Q. And you thought that the balance mentioned in that letter of \$4300.00 would be paid to Ladd & Tilton Bank, on or about May 1st. Wasn't that what you thought?

A. At the time of that writing, yes.

Q. And you wanted them to so understand that, didn't you? That Sullivan had earned \$4300.00, and that if they would release \$700.00 now, that the balance would be paid on or about May 1st. Wasn't that it?

A. Paid through them on or about May 1st.

Q. That was the impression you intended to create wasn't it?

A. I didn't give that letter to the bank.

Q. No, no, that is true. You didn't give the letter to the bank. But you knew it was going.

A. I didn't want to incriminate; I didn't want to hold the Hicks Company liable.

Q. Of course not, Mr. Katz, and I don't intend your testimony shall show that. I don't intend that at all. But what I want to get at is your intention as expressed in this letter. You wanted the bank to understand by that letter of April 3rd, that Sullivan had earned \$4300.00 which was unpaid.

A. No, he hadn't earned \$4300.00. At least I didn't feel he made \$4300.00 on the job.

Q. You understood that he had unpaid in your hands yet, \$4300?

A. \$4300.00.

Q. And that Sullivan had \$700 worth of outstanding creditors and you wanted these paid because it was an advantage to the Hicks Company, wasn't it?

A. Yes.

Q. You wanted those paid?

A. No advantage to Hicks; it was a courtesy to Mr. Sullivan.

Q. Well, anyway it was, you wanted it paid; however it might have been. You wanted the bank to understand they were to pay this \$700.00, and you would pay the bank \$4300—\$3600.00, which would be seven hundred from forty-three hundred; you would pay the balance of \$3600; the balance of the money would go to the bank. Isn't that right?

A. No.

Q. What did you want them to understand then?

A. Sullivan asked for a letter to them; he wanted to get the money released. I told them—I explained to Mr. Howard the condition of the thing beforehand, and that there would be \$3600 to be paid through Ladd & Tilton Bank. Where it went to, I don't know; if it was the creditors—if they were satisfied by that time, if Sullivan got any money or anything he could pay these men off, why it would have to be paid through Ladd & Tilton.

Q. Did you understand at that time, Mr. Katz, that Hicks was going to have to pay any of these claimants under Sullivan? You knew Hicks would have to pay his own bills, but did you know that Hicks was going to have to pay any bills of Sullivan's?

A. Sure.

Q. You did. At that time you thought that?

A. Yes.

Q. Why?

A. Well, the contractors is liable for the sub-contractors. We always in all our jobs are held liable.

Q. You are always held liable?

A. Yes, sir.

Q. Well, did you know that Hicks had up a bond?

A. Did I know that he had a bond?

Q. Yes.

A. Yes, sir.

Q. Did you know the amount of that bond?

A. No.

Q. You just simply knew he had a bond up?

A. Knew quite a large bond.

Q. Just a bond to insure the faithful performance of his contract, was it?

A. I don't believe I have ever seen the bond. I couldn't say.

Q. Didn't know what it was for?

A. For fulfillment of the contract was my presumption. That is all.

Q. Now, you knew what the contract called for of course. The new Lincoln High School, wasn't it?

A. Yes.

Q. And did you know at that time, Mr. Katz, that there could not be mechanics' liens against a public building?

A. I did not know that. I had only been in this town a couple of months.

Q. So you didn't know there couldn't be mechanics' liens against a public building at that time?

A. I did not.

Q. So you only figured then if Mr. Hicks was liable on his contract, he would be liable because of mechanics' liens placed against the building. Is that the ground of his liability in your mind?

A. Well, mechanics' liens, or suit, or anything else, attachments; whatever may come in that category.

Q. Well, I think I understand the point that I have been striving so hard for. Nothing to Mr. Katz disgrace or dishonor about that matter. Simply this, Mr. Katz, I wanted to understand your interpretation of the contract. You felt that as between two contesting claims, Ladd & Tilton Bank on one side with an assignment, and the Acme Plaster Company on the other side for material, you would have to pay the bank. That was your feeling, wasn't it?

A. I would have paid Ladd & Tilton Bank in preference—I don't know; I wouldn't have paid either of them, if a case like it was here.

Redirect Examination.

Questions by Mr. THOMAS:

You don't pretend you knew what the law was in reference to a matter of that kind, at that time, do you?

A. I have since found out they couldn't lien a school building in this town.

Q. You didn't know at that time what the law was in reference to a matter of that kind as to whether the Hicks Company would have to pay these claim-

ants, did you?

A. I was under the impression they would have to pay them.

Q. You don't mean to say then, that you considered this contract to mean that you would have to pay Ladd & Tilton and then in addition to that pay the claims against the building?

A. Certainly not.

COURT: Did you know at that time that Sullivan's firm individually owed Ladd & Tilton?

A. Yes, I knew.

COURT: You knew Sullivan was indebted personally to Ladd & Tilton?

A. No, not personally.

COURT: The corporation?

A. Yes, Mr. Howard told me.

Q. But it wasn't your intention in writing that letter that you meant to pay Ladd & Tilton and also pay in addition claims which would amount to more than \$4300.00 due the Sullivan Company?

A. No.

Q. Why did you fix May 1st as the time in that letter?

A. Well, this must have been in the latter part of March he completed his contract; they usually hold about 35 days.

Q. This is dated April 1st.

A. April 3rd.

Q. Down in here you say: "Of this amount we are willing to pay you now \$700." "There will be

due you on or about May 1st"—a balance due you. How did you happen to fix that May 1st?

A. Thirty five days is the expiration of the lien.

Q. You thought there was a lien period?

A. Yes.

Recross Examination.

Questions by Mr. HUNT:

If I may go back just one step. When you delivered the check to Ladd & Tilton Bank, under the order of Mr. Hicks for the amount of money.

A. Well, I won't say Mr. Hicks gave me the order. Some one over me did.

Q. Some one in the office did, whoever it was. When you delivered that check there, did the person so ordering you and the attorney for the company understand all the facts in this case?

A. I don't know what their understanding was.

Q. You don't know whether they knew there were unpaid creditors?

A. I don't know.

Redirect Examination.

Questions by Mr. THOMAS:

You took that check back when you didn't find Mr. Howard there. Why didn't you return with it to Mr. Howard afterwards?

A. I think I did return the next day, and found him out again. In the morning.

Q. Why didn't you finally turn the check over to

him?

A. Well, there was some—I got orders from somebody not to do it.

Mr. HUNT: Do you know from whom?

A. No, I couldn't state definitely, but it was either Mr. Wagner or Mr. Hicks. Must have been either one of them for they are the only ones over me.

Mr. HUNT: Is Mr. Wagner here now?

A. No, he is not.

Witness excused.

Mr. THOMAS: I desire to go on the stand myself in connection with this check proposition. That is all the evidence I have.

WARREN E. THOMAS, a witness called on behalf of the defendant, being first duly sworn testified as follows, without interrogatories.

Mr. Hicks came to me a short time before, probably in the early part of June, at least it was two or three days before Mr. Katz attempted to deliver the check to Mr. Howard—to attempt to determine whether or not Ladd & Tilton Bank should be paid under this order, and we were advised at that time that there were claims against the Sullivan Company that couldn't be paid if this \$3600.00 claim of Ladd & Tilton was to be paid. I knew nothing about this bond having been put up, and I must also confess that I knew nothing about this statute. I knew that there could be no liens placed against a public building. I was familiar with the general Mechanics' Lien Law, and after looking into it, I came to the conclusion that

since these claimants of the Sullivan Company couldn't recover against the building or against the Hicks Company, as I then believed it, that Ladd & Tilton were entitled to be paid, and I advised the payment—very bad advice it was—but I advised the payment to Ladd & Tilton. I pretty near made a very bad mistake, but I knew nothing about this bond having been put up. I discovered afterwards, however, this statute, and very hastily and urgently notified them if the amount had not been paid not to pay it. I then discovered they had attempted to pay it and fortunately Mr. Howard was out; the check hadn't been turned over, and it was at my instance the check hadn't been paid. That is the explanation, and that is all I care to say about it.

Witness excused.

Mr. THOMAS: That is all. We rest.

Defense rests.

Mr. HUNT: I may have a few questions in rebuttal.

Whereupon proceedings herein adjourned until 10 a. m. Tuesday, February 25, 1913.

Portland, Ore., Tuesday, February 25, 1913, 10 a. m.

A. C. SULLIVAN, recalled by defense.

Direct Examination.

Questions by Mr. THOMAS:

Mr. Sullivan, in alluding to the 10,000 feet of blocks to which you testified yesterday, which were delivered at the Smith Building, I desire to know what the

value of this 10,000 feet of blocks was.

A. Well, that was—that 10,000 feet was figured approximately and they would be worth about eight cents a foot or about \$800.

Q. \$800.00. Now, what percent of that would be materials that went into these blocks, and what percent would be the cost of the labor in connection with it?

A. Well, it would be the labor—

Mr. HUNT: I would like to interpose an objection. The rule announced by the Supreme Court of this state is that where articles go into separate buildings, part of which are labor bills and part of which are not, oral evidence is not permissible, so as to determine lienable from non-lienable articles.

COURT: He is asking as to the value of the labor.

Mr. HUNT: I understood the value of the material and I interpose the objection to that.

COURT: Relative to the value of the labor and material in this 10,000 feet.

Mr. HUNT: Save an exception.

A. The labor cost will be about 25 per cent and the material cost probably about—

Q. 75 per cent?

A. No, it would be the material and labor plus the profit. The material would probably be 35 per cent or 40 per cent. The balance would represent the profit.

Cross Examination.

Questions by Mr. HUNT:

When you were manufacturing blocks in the City of Portland at the time mentioned in the complaint, and referred to in the evidence, did you have any other contracts for the furnishing of blocks for other buildings?

A. While we were working on the school?

Q. Yes.

A. Yes, we had one with the Smith Hotel Building.

Q. Any other?

A. Well, we were furnishing some small orders. Just—not under contracts but under orders given to us.

Q. Will you please state whether at the time you were manufacturing blocks for the Lincoln High School, you were manufacturing blocks from the same material for other jobs.

A. Well, sir, when we got this Smith Hotel Building, we figured on using what three inch blocks were being made at the plant at the High School, to be put into the Smith Hotel. It was an outlet that was provided for these three inch blocks, which had to be made in making the six inch blocks.

Q. Was it your intention at the time you were manufacturing blocks for the Lincoln High School to manufacture other blocks to keep in stock as future reserve?

Mr. THOMAS: We object to intention; the question is whether he did.

Q. I will frame the question differently. Did you manufacture other blocks to keep in reserve as a stock?

A. Well, at the time they were made, they were not intended particularly for stock; we intended to sell them if we could. It happens that we still have some of them in stock.

Q. Did you manufacture more blocks at this time than you knew would be necessary to put in the Lincoln High School?

A. Well, we made more of those three inch blocks than we knew would be used. We didn't make any more other sizes than supposed to go in the school.

Mr. HUNT: That is all in cross examination, if I can have Mr. Sullivan for the purpose of rebuttal while he is on the stand.

Q. Mr. Sullivan, I wish you would make it clear whether or not you ever told Mr. Howard, prior to the first day of April, that you had indebtedness accruing on account of unpaid labor and material claims on the Lincoln High School and your contract with Hicks.

A. No, sir, I don't think I ever spoke to Mr. Howard about it at that time—previous to that time.

Mr. THOMAS: What date was that—April 1st?

Mr. HUNT: April 3rd, the date of the notice.

A. That is I don't think I ever directly called his attention to it or explained to him what we owed.

Q. Was it your intention Mr. Howard should so

understand you had other indebtedness, or did you intend he should be kept ignorant of that fact?

A. I didn't particularly mean he should be kept ignorant of it, but I wasn't anxious that he should know at that time just how we were involved. Just as I didn't—I didn't go to him and let him know that we were or to what extent, but I didn't use any means of not letting him know.

Q. Beg pardon?

A. I didn't use any means of not letting him know.

Q. You mean you didn't wilfully conceal, but you just simply didn't tell him the facts which he didn't ask about?

A. Yes, sir.

Q. Mr. Sullivan, I wish you would state if you know whether or not Ladd & Tilton Bank would have been in a better position at any time prior to the 3rd day of April, 1912, to have obtained satisfaction or security from the Sullivan Fireproof Partition Company, in reference to this debt, than it would have been any time subsequent to the 1st of May?

Mr. THOMAS: I object to that because counsel has stated that their only chance in this case is one of estoppel and the estoppel can't be prior to the 3rd day of April, 1912, the date of the letter introduced here. They claim their whole estoppel on account of that letter and they can't go back of that for the purpose of proving any estoppel.

Mr. HUNT: I think that is probably right. I will frame the question this way:

Q. Would the Ladd & Tilton Bank have been in a better position at any time subsequent to the 3rd day of April, and prior to the 1st day of May, to have obtained satisfaction or security from the indebtedness owing, than it would have been any time subsequent to the first day of May?

A. Well, they might have been but I can't say. I can't say what conditions might be brought about by their endeavoring to collect at any time. It might have been better or it might have been worse.

Q. But I understand you to say that if they had sued subsequent to the 3rd day of April and prior to the 1st day of May, they might have been in better position than they were after the first day of May.

Mr. THOMAS: I didn't understand him to say that.

Q. That was my understanding; if that is not true, what was?

A. It is possible they might have been or might not have been. I can't presume of course.

Mr. HUNT: That is all.

Witness excused.

J. H. BUSH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Mr. HUNT: This witness' testimony is a part of my main case.

Questions by Mr. HUNT:

Mr. Bush, you will please state what official posi-

tion if any you hold with the County of Multnomah, State of Oregon.

A. Chief Deputy County Clerk.

Q. For Multnomah County?

A. For Multnomah County, State of Oregon.

Q. Is it among your duties to have charge of the papers filed in proceedings in the county of Multnomah?

A. It is.

Q. I hand you what purports to be complaint filed in the case of the Lewis A. Hicks Company vs. Sullivan Fireproof Partition Company, a corporation, and the United States Fidelity & Guaranty Company, a corporation, and ask you if that is such complaint.

A. It is a duly certified copy of the complaint as filed, in the Circuit Court of the State of Oregon, for the County of Multnomah.

Q. And is that suit now pending?

A. Now pending.

Q. Is that a certified copy of all the pleadings in that case?

A. Certified copy of that complaint. That is the only thing on file, I think, except the summons.

Mr. HUNT: If your Honor please, I should like to offer this in evidence. I am not sure as to its materiality except as to this point—my purpose is this: That the Hicks Company has pled that they are liable for these unpaid material men and labor claims, and I have denied that fact, and this complaint shows that they are now suing the Sullivan Fireproof Par-

tition Company and the Surety Company for the amounts which they are defending against us. The amounts are identical.

COURT: Put it in the record, subject to Mr. Thomas' objection.

Mr. THOMAS: I think it is immaterial and by looking at the bond in there, it shows that the bond must be sued upon within a certain time, and that the complaint must be filed to protect our rights. We, of course, expect to recover from the bond any difference between \$4500 and \$3700.00.

Complaint marked Plaintiff's Exhibit 9.

Witness excused.

A. C. SULLIVAN, recalled by the defendant.

Direct Examination.

Questions by Mr. THOMAS:

Mr. Sullivan, just before leaving the stand, as I recollect it, you made a statement that there were a few of these blocks that were taken from the High School Building that you still had on hand?

A. Yes, sir, that is right.

Q. I would like to know the amount of those blocks.

A. About—I could only estimate approximately. I think at the present time we have about 12,000 feet of blocks in stock.

Q. You still have those blocks?

A. Yes, sir, or did have the last I knew of them.

Q. Mr. Sullivan, were the entire 12,000 feet taken

from the Lincoln High School Building?

A. Oh no. No, only a portion of them; I should say probably 20 per cent of them were made at the school and taken over to the East Side and put in stock.

Q. 2400 feet?

A. Yes, probably around that amount.

Witness excused.

Defense rests.

R. S. HOWARD, recalled in rebuttal.

Direct Examination.

Questions by Mr. HUNT:

Mr. Howard, will you please state whether or not Mr. Katz of the Hicks Company ever made any statement to you prior to May 1st that the Sullivan Company had unpaid creditors, materialmen and laborers, who would have to be paid out of the funds belonging to Sullivan.

A. He did not.

Q. Did Mr. Sullivan ever so state to you at that time?

A. I have no recollection of it.

Q. Did any one so state to you?

A. I have no recollection.

Witness excused.

Plaintiff rests.

Defense rests.

[Plaintiff's Exhibit 7.]**ARTICLES OF AGREEMENT.**

This Agreement made this 29th day of April, 1911, at San Francisco, California, between J. D. Sullivan of Salt Lake City, Utah, the first party, and LEWIS A. HICKS COMPANY, a corporation, as original contractor with School District No. 1, Multnomah County, Oregon, the second party.

WITNESSETH: Hereinafter the first party is called the SUB-CONTRACTOR, and the second party is called the CONTRACTOR, and the singular number includes the plural.

All written notices to the SUB-CONTRACTOR provided for by this agreement may be given by mailing a copy of such notice addressed to the SUB-CONTRACTOR at Number 121 Atlas Block, Salt Lake City, Utah, or by delivering a copy of such notice to the SUB-CONTRACTOR in person, or by leaving a copy of such notice at his place of business during business hours.

I. The SUB-CONTRACTOR agrees to furnish the necessary labor and materials, including tools, implements, scaffolding and all appliances required, and perform and complete in a workmanlike manner all work required by the specifications hereinafter mentioned under the headings:

Plaster Block partitions inclusive of the furnishing and setting of all approved partition blocks with grounds, nailing blocks and back boards required for

the fastening of trim or other material attaching to the partitions, but exclusive of bucks for all openings to be supplied and set by the contractor at his own expense, on and in connection with a Brick and Steel High School building now being, or about to be, erected at Portland, Oregon, on that parcel of land described as follows: Block 202, bounded by Mill, Market, Seventh and Park Streets, and at the time and at the rate of progress hereinbelow provided for, in conformity with the plans, drawings and specifications for the same made by Whitehouse and Fouilhoux (and with the contract between the contractor and owner, to which the attention of the sub-contractor is directed), the authorized Architect employed by the OWNER for the construction of said buildings, which plans, drawings and specifications are referred to in the contract for the erection of said building between the CONTRACTOR and said OWNER; and all pages of which plans covering plaster block work and 3 pages of which specifications numbered 50, 51 and 52 have been signed by the parties hereto.

II. The SUB-CONTRACTOR shall commence work on said building under this agreement on the 1st day of July, 1911, unless otherwise notified by the CONTRACTOR in writing, and shall complete said work on the 30th day of September, 1911, progressively as required and directed, to conform to the progress of other crafts. In case the contractor, by reason of unforeseen delays is unable to give the sub-

contractor access to the building on the 1st day of August, the time of completion shall be extended to cover the actual delay, it being understood that the thirty days preceding the 1st of August are required for the fabrication and proper curing of the plaster blocks. Anything herein contained to the contrary notwithstanding, the SUB-CONTRACTOR shall commence work on said building under this agreement at any time after Aug. 1, 1911, upon 3 days written notice to the SUB-CONTRACTOR and shall prosecute the work herein provided for with diligence, at all times supplying as much labor and materials as in the judgment of the CONTRACTOR can be used to advantage, regardless of the time of completion above specified.

III. The SUB-CONTRACTOR shall prepare and assemble at temporary shop in the vicinity of the building fit and ready for delivery on said job and open to inspection of the CONTRACTOR the materials to be used in the work herein contracted for as follows:

All the plaster blocks required for the work herein contracted for, viz: 29700 sq. ft. 4-in. Duct partition, 25000 sq. ft. 4-in. Straight partition, 73700 sq. ft. 6-in. Straight partition being straight measurement inclusive of payment for all wall openings, fabricated progressively not less than 30 days before required to allow approved curing of same. The above quantities are guaranteed by the Contractor to be sufficient to complete the work called for and in case more is re-

quired, the sub-contractor shall be paid at the rate of 13 cents and 14 cents per sq. ft. respectively for 4-in. and 6-in. blocks set in place. Any change in plans is to be compensated for or deduct for at same rates. If the work requires less material than the quantities named not caused by change of plan, no claim for deduction for such saving shall be made by the contractor. When once thus prepared and assembled said materials must be so kept ready for delivery.

IV. At all times between the date for commencement of work hereunder, and the date of the completion of the work, it shall be the duty of the SUB-CONTRACTOR to have on the job a foreman or superintendent, who shall be the duly authorized representative and agent of the SUB-CONTRACTOR in all matters pertaining to this contract, and a failure of the SUB-CONTRACTOR so to do shall be deemed a failure to supply sufficient workmen to comply with the provisions of this contract, and the SUB-CONTRACTOR stipulates that his superintendent (or if there be none, then his foreman) on the job is such agent.

V. Should the SUB-CONTRACTOR at any time after the time for commencement of the work or for the preparation and assembly of materials, refuse or neglect, without the fault of the Architect, or the CONTRACTOR, to supply sufficient materials and workmen, or either, to comply with the provisions of this contract, for a period of more than two days after

having been notified in writing by the CONTRACTOR to furnish the same, the CONTRACTOR shall have the power to furnish and provide materials and workmen to continue, or commence and continue said work, and the reasonable expense thereof shall be deducted from the amount of the contract price herein specified; and if such reasonable expense, plus the amounts then already paid or payable under and by virtue of this contract, be in the aggregate in excess of the contract price, then the amount of such excess shall be a charge against the SUB-CONTRACTOR, which he agrees to repay to the CONTRACTOR on demand.

IT IS FURTHER AGREED that a failure by the SUB-CONTRACTOR to furnish a sufficiency of materials or workmen, or either, to comply with the provisions of this contract, for more than two days after notice in writing to furnish the same, shall, at the option of the CONTRACTOR, be conclusively deemed to be an abandonment of this contract by the SUB-CONTRACTOR, notice of the exercise of which option is hereby expressly waived by the SUB-CONTRACTOR, and the CONTRACTOR may at his election and without notice furnish and provide materials and workmen for the purpose of finishing and completing, and finish and complete the work required by this contract, and the reasonable expense thereof shall be deducted from the amount of the contract price; and if such reasonable expense, plus the amount then already paid or payable under this con-

tract, be in the aggregate in excess of the contract price, then the amount of such excess shall be a charge against the SUB-CONTRACTOR, which he agrees to repay to the CONTRACTOR on demand.

IT IS AGREED that if the CONTRACTOR shall do the work herein contracted for, or any part thereof, under any provisions of this Sub-division (i. e., Sub-division V), it shall have the right to take and use such materials as may have been made ready for this job by the SUB-CONTRACTOR upon paying or crediting the latter with the value thereof, estimated on the whole contract price. Anything herein contained to the contrary notwithstanding, it is understood and agreed that all materials herein mentioned or referred to remain the property of the SUB-CONTRACTOR until incorporated in said building or until paid or credited for by the CONTRACTOR.

VI. The CONTRACTOR shall provide and furnish to the SUB-CONTRACTOR all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and materials furnished in accordance therewith, under the direction and supervision and subject to the approval of the CONTRACTOR and Architect.

VII. The SUB-CONTRACTOR admits that he has examined the site and the drawings and specifications and that the said drawings and specifications and site are adequate for their intended purposes, and covenants and agrees to follow the same in detail and to furnish all the materials of the quality

and kind set forth in said specifications and execute all work strictly in accordance with said drawings, using for data and dimensions the numerals marked on each drawing in preference to what the drawing may scale, and to be governed in each case by the detail drawing, in preference to what the general drawing may show, for the same part of the work; to make the work shown and described by said drawings and specifications a perfect and finished job of its kind; and to acquaint himself fully in regard to the construction and finish, as called for by the specifications for said work. To use due care in the various parts of the work, and whenever the drawings or specifications, or both, for any part of the work, are in his opinion, or the opinion of his agent, faulty, or such as will, if followed, result in unsafe and imperfect construction, or will cause the building either during or after its completion to be insecure or deteriorate in any respect so as to result in pecuniary loss to the OWNER or CONTRACTOR, or in any damage or loss whatsoever to person or property, he will instantly stop work and will notify the CONTRACTOR personally in writing of such opinion and in what regard said drawings and specifications are insufficient; and the part of the work so criticized shall not thereafter proceed until the SUB-CONTRACTOR has received a written order from the CONTRACTOR directing what is to be done and when to proceed. To co-operate with the Sub-contractors for the other work on said building, so that

the whole work shall steadily proceed and become a finished and complete one of its kind, and to so carry on said work that none of the co-operating Sub-contractors shall be hindered or delayed at any time; and when his part of the work is finished to remove from the premises all tools and materials belonging to himself and fill up all holes and trenches, level all mounds or heaps of earth that may have been built, dug, raised or made by him in the execution of his work or incident thereto and remove and clear away all surplus or waste materials or refuse of whatever kind remaining on, in or about the building or property, resulting from or connected with his work, and dispose of such refuse material at such places upon or near the property as the CONTRACTOR may designate, or, if so required, remove it entirely, and so far as he is concerned leave the job in a clean, neat, tidy and workmanlike condition, clear of all refuse and litter of every description. To take all necessary precautions and to place proper guards to prevent accidents; and to put out and keep at night suitable and sufficient lights. To be responsible for all violations of Federal or State laws or City Ordinances relating to the construction of buildings and the obstruction of streets and sidewalks and of any other laws or ordinances affecting said work, and to comply with all the laws or ordinances regulating building construction, including all rules and regulations of the various departments of the municipal government, particularly those relating to the Department of Electricity,

Department of Police, Department of Public Health, Department of Public Works, or to any other department having any control, direction or supervision of buildings or of the use or occupation of streets or any part thereof. And the SUB-CONTRACTOR agrees that he will carefully repair and make good any damages to the street or pavement that may be caused by any operation connected with his work; to obtain and be at the expense of all the necessary permits, licenses and authority from the City, County, State or Federal Government which are required for the proper and lawful prosecution of his work. To at all times give the CONTRACTOR or his agents or employees free access to all parts of the work. To deliver to the CONTRACTOR upon his demand correct statements of the amount of labor performed and materials furnished under the contract. The SUB-CONTRACTOR shall carry on the work described herein at his own risk until the same is fully completed and accepted and he shall rebuild, repair, restore and make good all injuries and damages occasioned by the elements or by other causes to all or any portion of his work.

VIII. The SUB-CONTRACTOR agrees to indemnify and hold harmless the CONTRACTOR from any and all claims for damages by reason of injuries to person or property occurring in the course of the performance of the work herein provided for; and in case any accident occurs in the course of the performance of the work herein provided for which re-

sults in loss, injury or damage to any person or the property of any person or to the premises or property on which this agreement is to be performed, or to the premises, land, buildings or walls adjoining said premises on which this agreement is to be performed, then the said SUB-CONTRACTOR will obtain acquittances and complete discharges from such damaged or injured person or from his personal representative, or will make payment in full to such damaged or injured person or personal representative of such an amount as may be agreed upon by way of settlement or compromise between them; and in case of claim made or suit brought against said CONTRACTOR arising out of or on account of any such personal injury, death or damage to property or premises above mentioned said SUB-CONTRACTOR hereby expressly agrees and binds himself, his heirs, executors, administrators, successors and assigns to well and truly defend, indemnify and forever save harmless said CONTRACTOR from the necessity of defending such suit or suits or paying such claim or claims or any part thereof or from any expense or pecuniary loss in connection with the same; to re-pay said CONTRACTOR any sums necessarily expended by him by way of costs, attorney's fees or otherwise in defending against any such claim or claims and to himself cause any such suit or suits to be defended to their end or compromised, paying all sums, charges, costs and attorney's fees whatsoever thereby entailed.

IX. The SUB-CONTRACTOR expressly cove-

nants and agrees to protect and save harmless the CONTRACTOR from loss or damage by suit or otherwise for infringement or alleged infringement of patents for materials or methods used in the doing of any work provided for herein, called for in the drawings or specifications referred to in this contract. The SUB-CONTRACTOR further covenants and agrees that he will repair and replace any part of the work done under this contract which shall be found to be defective or faulty, to the same extent and for the same period of time that the CONTRACTOR is or may be liable to the OWNER to repair or replace the same.

X. The SUB-CONTRACTOR agrees to save and keep the said building and premises free and clear of any and all mechanics' liens for work or labor done or materials furnished in the doing of the work specified herein, and in this connection the SUB-CONTRACTOR agrees to pay promptly as they become due all sums incurred for such work or labor done or materials furnished, and in case of any default on the part of the SUB-CONTRACTOR, the CONTRACTOR shall have the right to pay said sums, together with any additional sums the payment of which is necessitated by such default of the SUB-CONTRACTOR, either for costs, attorney's fees or otherwise, and all sums so paid by the CONTRACTOR shall be repaid by the SUB-CONTRACTOR, and the CONTRACTOR may withhold any money due the SUB-CONTRACTOR until such indebtedness is repaid,

and the CONTRACTOR may declare this contract rescinded, resume possession of the premises, complete the work and charge the same against the SUB-CONTRACTOR, all in the manner and with the same rights as are provided in subdivision V hereof.

XI. Should the SUB-CONTRACTOR fail to complete this contract and the works provided for herein within the time for such completion determined according to the terms of this agreement he shall be liable to the CONTRACTOR for all loss and damages which it may suffer on account of such failure. It is further understood and agreed that no extra allowance of time shall be made for the performance and completion of any extra work, alterations or additions required or ordered as herein provided, but that such extra work, alterations and additions shall be completed as if they had been comprised in the original work and within the period limited for the completion of the same, unless an extension of time is permitted in writing by the CONTRACTOR.

XII. The CONTRACTOR agrees in consideration of the performance of this contract by the SUB-CONTRACTOR to pay or cause to be paid to the SUB-CONTRACTOR, the sum of Seventeen thousand five hundred no|100 Dollars at the times and in the manner following, to-wit: Seventy five per cent of the value of the material installed, every two weeks, on the 1st and 15th of each month respectively, and the remaining twenty five per cent thirty five days after the final completion and acceptance of all the

work in this contract.

The proportion in value of said work and materials furnished to the whole contract price shall be estimated by the CONTRACTOR.

PROVIDED, that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained by the SUB-CONTRACTOR from the said Architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the SUB-CONTRACTOR, or, in lieu of such certificates, shall deliver to the SUB-CONTRACTOR in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied to entitle the SUB-CONTRACTOR to the certificate or certificates, and Provided, that at the option of the CONTRACTOR no payment shall become due until the SUB-CONTRACTOR shall have delivered to the CONTRACTOR receipts showing, to the satisfaction of the CONTRACTOR, payment by the SUB-CONTRACTOR for all labor done and materials furnished under this contract, up to and inclusive of the amount of all previous payments made, and in case of the first payment, inclusive of its amount.

XIII. The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications,

or vice versa, is to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together.

XIV. No part of the work shall be altered from that shown on or described by the plans and specifications, nor shall any work in the nature of extra or additional work to be performed without the express written order of the CONTRACTOR, but the CONTRACTOR may order and direct any increase, diminution or alteration in the work to be performed without in any manner vitiating or affecting this contract, and the SUB-CONTRACTOR shall in pursuance of such order and direction perform the work accordingly. Whenever any extra or additional work in the nature of alteration is required to be done the CONTRACTOR shall fix such prices or cost as it may deem just and equitable and the SUB-CONTRACTOR shall abide thereby, provided it commences such work, but if the SUB-CONTRACTOR declines to execute such work at the prices or cost so fixed then the CONTRACTOR shall have the right to do such work itself or enter into a contract with any other person or persons for its execution. And in case of any diminution or alteration in the work to be performed, of a kind decreasing its reasonable cost, the amount thereof shall be deducted from the amount of the contract price aforesaid by a fair and reasonable valuation.

XV. The rule of practice to be observed in the ful-

fillment of the last foregoing paragraph XIV shall be that upon the demand of either party hereto, the character and valuation of any or all charges, omissions or extra work shall be agreed upon and fixed in writing, signed by the parties hereto prior to execution.

XVI. Should and dispute arise between the parties hereto respecting the true construction of the drawings and specifications, the same shall, in the first instance, be decided by the CONTRACTOR, but should the SUB-CONTRACTOR be dissatisfied with the justice of such decision, or should any dispute arise between the parties hereto respecting the valuation of alterations or work omitted, the disputed matter shall be referred to and decided by two competent persons who are experts in the business of building, one to be selected by each of the parties hereto; and in case they cannot agree, these two shall select an umpire, and the decision of any two of them shall be binding on both parties.

XVII. The payment of progress payments by the CONTRACTOR shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work is to be subjected to the inspection and approval of the Architect and CONTRACTOR at the time it shall be claimed by the SUB-CONTRACTOR that the contract and works are completed.

XVIII. Neither this contract nor any interest therein nor any duties to be performed hereunder shall be assigned voluntarily or involuntarily or sub-

let by the SUB-CONTRACTOR without the written consent of the CONTRACTOR.

XIX. No claim for extra work shall be considered unless the price of the same shall be agreed upon in writing between the parties hereto prior to the commencement of the same.

Time is the essence of this agreement.

Executed in duplicate the day and year first hereinabove written.

LEWIS A. HICKS COMPANY,

By Lewis A. Hicks,

President.

J. D. Sullivan.

By A. C. Sullivan

His attorney in fact.

Approved bond of surety Co. in sum of \$6,000 to be furnished before contract is effective, together with certified copy of power of attorney.

Lewis A. Hicks.

[Plaintiff's Exhibit 8.]

Hartman & Thompson, Gen. Agts.

Amount \$6,000.00

Annual Premium \$87.50

THE
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY.

Home Office, Baltimore, Md.

— — — —

KNOW ALL MEN BY THESE PRESENTS,
That Sullivan Fireproof Partition Co., a corporation

organized under the laws of the State of Washington, (hereinafter called the Principal) and the UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation created and existing under the laws of the State of Maryland, and whose principal office is located in Baltimore City, Maryland (hereinafter called the Surety), are held and firmly bound unto LEWIS A. HICKS COMPANY, a corporation, (hereinafter called the obligee), in the full and just sum of Six Thousand and No|100 (\$6,000.00) Dollars, lawful money of the United States, to the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents, signed, sealed and delivered this 3d day of November, A. D. 1911.

WHEREAS, said Principal has entered into a certain written contract with the Obligee, which contract was originally executed April 29th, 1911, between J. D. Sullivan, of Salt Lake, Utah, and Lewis A. Hicks Company, and assigned to said principal on the 3d day of November, 1911, wherein it is agreed to do and perform all the work for the plaster block partitions, inclusive of the furnishing and setting of all approved partition blocks with grounds, nailing blocks and back boards required for the fastening of lime or other materials attaching to the partitions, but exclusive of bucks for all openings to be supplied and set by the Contractor at his own ex-

pense, on and in connection with a Brick and Steel High School Building, at Portland, Oregon, on Block 202 bounded by Mill, Market, Seventh and Park Streets, IT IS, HOWEVER, expressly understood and agreed that this bond guarantees the completion of the contract in accordance with its terms and conditions, but it is not intended and does not guarantee against damages for personal injury or infringement of patents, as more specifically referred to in Sections VIII and IX of said contract.

NOW, THEREFORE, The condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and save harmless the said Obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law;

PROVIDED, however, that this bond is issued subject to the following conditions and provisions:

FIRST: That no liability shall attach to the Surety hereunder unless, in the event of any default on the part of the Principal in the performance of any of the terms, covenants or conditions of the said contract, the Obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the Surety at its office in the City of Portland, Oregon, written notice thereof with a statement of the principal facts showing such default and the date there-

of; nor unless the said Obligee shall deliver written notice to the Surety at its office aforesaid, and the consent of the Surety thereto obtained, before making to the Principal the final payment provided for under the contract herein referred to.

SECOND.—That in case of such default on the part of the Principal the Surety shall have the right, if it so desire, to assume and complete or procure the completion of said contract; and in case of such default, the Surety shall be subrogated and entitled to all the rights and properties of the Principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the Obligee, and all deferred payments, retained percentages and credits due to the Principal at the time of such default, or to become due thereafter by the terms and dates of the contract.

THIRD.—That in no event shall the Surety be liable for a greater sum than the penalty of this Bond, or subject to any suit, action or other proceeding thereon that is instituted later than the 3d day of November, A. D. 1912.

FOURTH.—That in no event shall the Surety be liable for any damage resulting from, or for the construction or repair of any work damaged or destroyed by an act of God, or the public enemies, or mobs, or riots, or civil commotion, or by employes leaving the work being done under said contract on account of so-called "strikes" or labor difficulties.

IN TESTIMONY WHEREOF, the said Principal

has caused these presents to be sealed with its corporate seal, attested by the signature of its duly authorized officers, and the said Surety has caused these presents to be executed by its Attorney-in-fact, sealed with its corporate seal, the day and year first above written.

SULLIVAN FIREPROOF PARTITION CO.

By A. C. Sullivan,
Secretary.

ATTEST: J. D. Sullivan, President.

By A. C. Sullivan,
His Atty. in fact.

THE UNITED STATES FIDELITY AND
GUARANTY CO.

Countersigned by	By Douglas R. Tate,
HARTMAN & THOMPSON,	Attorney-in-fact.
General Agents.	(Seal)

Jan. 18th, 1912.

Received of Lewis A. Hicks Co.

Power of Attorney from J. D. Sullivan to A. C. Sullivan, same having been attached to bond.

A. C. Sullivan.

[Defendant's Exhibit "A".]

WHITEHOUSE & FOUILHOUX
Architects.

Portland, Oregon

This Agreement, made the
day of January in the year one thousand nine hundred
and eleven by and between Lewis A. Hicks Company,

a corporation organized under the law of Nevada, party of the first part (hereinafter designated the Contractor), and School District No. 1 of Multnomah County, Oregon, party of the second part (hereinafter designated the Owner),

Witnesseth, that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

Article I. The Contractor shall and will provide all the materials and perform all the work for the complete construction, with the exception of the heating and ventilating, plumbing, electric wiring, and fixtures, finishing hardware, plastering, painting, glazing and linoleum flooring, of the whole basement and part of building above first floor shown on plans between Market, Mill, Park Streets and red line, of the New Lincoln High School, as shown on the drawings and described in the specifications prepared by WHITEHOUSE & FOUILHOUX, Architects, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be neces-

sary to detail and illustrate the work to be done are to be furnished by said Architects, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architects are and remain their property, and that all charges for the use of the same, and for the services of said Architects, are to be paid by the said Owner.

Art. III. No alterations shall be made in the work except upon written order of the Architects; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

Art. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects or their authorized representatives; shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice

condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Art. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall ex-

ceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architects, whose certificate thereof shall be conclusive upon the parties.

Art. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

Have the entire building ready to be plastered within eight months from execution of this contract, the interior finish to be set as soon as plaster work will permit, and should they fail to complete the work within the time agreed on, agrees to pay to the Owner for each and every day of such delay beyond the term of completion, as above defined, the sum of One Hundred Dollars (\$100.00) which sum is hereby agreed upon, fixed and determined by the parties hereto as the liquidated damages that the Owner will suffer by such default and shall be deducted as such from the balance due the contractors.

Art. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architects, or of any other contractor employed by the Owner upon

the work, or by any damage caused by fire or other casualty for which the Contractor are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architects; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within forty-eight hours of the occurrence of such delay.

Art. VIII. The Owner agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that they will reimburse the Contractor for such loss; and the Contractor agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be two hundred and sixty-seven thousand, one hundred

and no-100 Dollars (\$267,100.00) subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor, in current funds, and only upon certificates of the Architects, as follows:

Payments will be made monthly on account of the work executed to the satisfaction of the Architects, based on the estimated ninety per cent (90%) value thereof as ascertained by the Architects the balance of ten per cent (10%) of such estimate will be retained until the final inspection of all materials embraced in this contract and the acceptance of the work, and which being the final payment shall be made within thirty-three days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify.....against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment

made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Art. XI. The Contractor shall during the progress of the work maintain insurance on the same against loss or damage by fire, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

Art. XII. In case the Owner and Contractor fail to agree in relation to matters of payment allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architects referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architects within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one half of the expense of such reference.

Art. XIII. It is further agreed by and between the parties hereto that any changes in the plans and specifications made by the Owner, touching the work done under this contract, shall not in any way impair

the validity of same as to its general binding force and effect or have any other effect than as to the changes made and in all other respects the contract shall continue in full force and effect as executed and the party further agrees to give a Surety Bond in the Sum of One Hundred Sixty Thousand and no-100 Dollars (\$160,000.00) for the faithful performance of this contract.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands and seals the day and year first above written.

In presence of

LEWIS A. HICKS CO. (Seal)

Lewis A. Hicks, President.

SCHOOL DIST. NO. 1, MULT-
NOMAH CO., ORE.

(SEAL)

By L. W. Sitton, Chairman.

By R. H. Thomas, School Clerk.

[Stipulation as to Exhibits.]

IT IS HEREBY STIPULATED AND AGREED by and between the above named parties by and through their respective attorneys of record, that plaintiff's exhibit "9" may be omitted from the bill of exceptions, owing to the great length thereof, and it

is hereby stipulated that said plaintiff's exhibit "9", for the purpose of this appeal shall be deemed to be as follows:

Plaintiff's exhibit "9" is a certified copy of a complaint in an action instituted by Lewis A. Hicks Company, a corporation, plaintiff, vs. Sullivan Fireproof Partition Co., a corporation, and the United States Fidelity and Guaranty Co. a corporation, defendants, in the Circuit Court of the State of Oregon for the County of Multnomah. That said action was instituted by the plaintiff therein for the purpose of recovering from the principal and bondsman the loss sustained by the Lewis A. Hicks Company on account of the default of the Sullivan Fireproof Partition Co., which bond is referred to in this cause as plaintiff's exhibit "8", and further that the said plaintiff in said complaint, to wit, Lewis A. Hicks Company vs. Sullivan Fireproof Partition Co. and the United States Fidelity and Guaranty Co. asked judgment in said complaint against the Sullivan Fireproof Partition Co. and the United States Fidelity Co. in the sum of \$4,818.65, which sum is composed of the various amounts set forth in this bill of exceptions and as testified to by A. C. Sullivan on pages 53 to 65 inclusive, and pages 64 to 72 inclusive, thereof.

IT IS FURTHER STIPULATED AND AGREED that if the Circuit Court of Appeals shall deem this stipulation to be insufficient and that a full copy of the exhibit should have been attached to the bill of exceptions, then and in that case it is hereby

STIPULATED AND AGREED that the said Circuit Court of Appeals may disregard plaintiff's exhibit "9" and shall deem and consider the same not in the case and immaterial to any issues therein, and that the said Circuit Court of Appeals may, if it will, render its decision in this cause irrespective of said plaintiff's exhibit "9".

WOOD, MONTAGUE & HUNT,
Attorneys for plaintiff.
CHAMBERLAIN, THOMAS &
KRAEMER,
LESTER W. HUMPHREY,
Attorneys for defendant.

SO ORDERED.

R. S. BEAN,
Judge.

UNITED STATES OF AMERICA,
District of Oregon.—ss.

THIS CERTIFIES that on this 16th day of May, 1913, the plaintiff, by Wood, Montague & Hunt, its attorneys, presented to the court the foregoing 113 pages of typewritten matter as and for its bill of exceptions in the above entitled cause, and the defendant having been duly served with a copy thereof and having made no objection thereto, and the court having examined the same and being fully satisfied in the premises, the foregoing is allowed and settled as the bill of exceptions for the plaintiff, duly stating those exceptions taken by the plaintiff to the ruling of the

court during said trial, together with sufficient of the testimony to explain the same. That the foregoing testimony, evidence and exhibits are all of and the whole of the testimony, evidence and exhibits offered and received in the above entitled court and cause.

R. S. BEAN,
Judge.

[Endorsed]: Bill of Exceptions. Filed May 29, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

[Petition for Writ of Error.]

(Title.)

Ladd & Tilton Bank, a corporation, plaintiff in the above entitled cause, feeling itself aggrieved by the judgment of the above entitled court, entered the 10th day of March, 1913, comes now by Wood, Montague & Hunt, its attorneys, and petitions said court for an order allowing the said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and approved, and also that an order be made fixing the amount of security which the plaintiff shall

give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

WOOD, MONTAGUE & HUNT,

Attorneys for plaintiff.

[Endorsed]: Petition for Writ of Error. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows, to wit:

[Order Allowing Writ of Error.]

(Title.)

On this 21 day of August, 1913, came the plaintiff by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error and presented an assignment of errors intended to be urged by it, praying also that the transcript of record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as are proper in the premises, and in consideration

whereof the court does allow the writ of error, upon the plaintiff giving a bond according to law in the sum of five hundred dollars, which will operate as a supersedeas bond.

R. S. BEAN,

Judge of the above entitled court.

[Endorsed]: Order Allowing Writ of Error. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

(Title.)

Comes now the plaintiff and files the within assignments of error upon which it will rely in its prosecution of the writ of error in the above entitled suit.

I.

That the United States District Court for the District of Oregon erred in overruling the objection of counsel for plaintiff in error to the following question propounded to the witness A. C. Sullivan, and the answer given in response thereto, which objection was on the ground that the same was incompetent, irrelevant and immaterial and not pertinent to any issues made by the pleadings in the case.

Question by Mr. Thomas:

Q. What were the things that Roebling & Com-

pany furnished to you in connection?

A. There was reinforcing wire.

II.

That the United States District Court for the District of Oregon erred in overruling the objection of counsel for plaintiff in error to the propounding of the questions to and the answers given by the witness A. C. Sullivan, relative to the claim of Roebbling Sons Company and what was paid thereunder and of what the claim consisted and the consideration therefor. The objection was upon the ground and for the reason that the same was incompetent, irrelevant and immaterial and not material to any issues made by the pleadings in the case. The objection and ruling of the court went to all the testimony concerning said claim, which testimony is as follows:

Questions by Mr. Thomas:

Q. Do you remember, Mr. Sullivan, how the amount of the unpaid claims of the various materialmen furnishing stuff to you upon this building is—what the amount is?

A. Somewhere about \$4500.

Q. About \$4500.00. Have you, Mr. Sullivan, your books here indicating the amounts that are due to the various claimants?

A. Yes.

Q. I will ask you to produce them. (Witness gets boogs.) What book is that you have, Mr. Sullivan?

A. I call it a ledger.

Q. Call it a ledger. Who made the entries in that

book?

A. I did.

Q. So that the entries therein are from your own personal knowledge?

A. Yes, sir.

Q. And they were not entered by anybody else?

A. No, sir.

Q. Is there anything in there, Mr. Sullivan, in connection with the claim of Roebling's Sons Company against the Sullivan Fireproof Partition Company?

A. Yes, sir.

Q. Will you state what the Roeblings' Sons Company furnished to you, if anything, that caused that charge to be put in that book.

To which question counsel for plaintiff in error objected on the ground that the same was not proper cross examination, which objection was sustained by the court, and thereupon counsel for the defendant in error made the witness A. C. Sullivan his own witness and proceeded as upon direct examination.

Questions by Mr. Thomas:

Q. What were the things that Roebling & Company furnished to you in connection?

A. There was reinforcing wire.

Q. Now what did you say that stuff was that Roebling Sons Company furnished?

A. It was reinforcing wire.

Q. Where was that used?

A. It was used in making these blocks.

Q. Blocks for what?

A. Partition blocks.

Q. Partition blocks. Where were the partition blocks used?

A. In the partition work at the Lincoln High School, and other places as well.

Q. What was the amount of the claim of Roebblings Sons?

A. It totalled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

Questions by Mr. Hunt:

Q. Now you say, you testified that the Roebblings Sons Company's claim is the only one that has been paid?

A. Yes, of those we have mentioned.

Q. Do you know that it was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they told you?

A. Yes, Roebbling, never told me.

Q. You don't know of your own knowledge that it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them—not from Roebbling.

Q. Well, I won't object to the manner you know

it, but do you know how it was paid?

A. I think through a judgment entered against us and Roebbling garnished the money that Hicks had, for our account.

III.

That the United States District Court for the District of Oregon erred in overruling the motion of counsel for plaintiff in error whereby it was moved that the testimony of A. C. Sullivan relative to the payment of Roebblings Sons Company's claim be stricken out, for the reason that it was paid under writ of garnishment served upon the Hicks Company, and under the rule of law Hicks Company could not return anything due the Sullivan Fireproof Partition Co. by virtue of the assignment admitted to be executed in this case.

The testimony of A. C. Sullivan sought to be stricken out is as follows:

Questions by Mr. Thomas:

Q. What was the amount of the claim of Roebblings Sons?

A. It totalled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

Questions by Mr. Hunt:

Q. Now you say, you testified that the Roebblings Sons Company's claim is the only one that has been paid?

A. Yes, of those we have mentioned.

Q. Do you know that it was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they told you?

A. Yes, Roebling never told me.

Q. You don't know of your own knowledge that it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them, not from Roebling.

Q. Well, I won't object to the manner you know it, but do you know how it was paid?

A. I think through a judgment entered against us and Roebling garnisheed the money that Hicks had, for our account.

The assignment referred to in the objection, the execution of which is admitted, is as follows, and is plaintiff's exhibit "2":

"Portland, Ore., Dec. 18, 1911.

"Lewis A. Hicks Company,

"Worcester Bldg., City.

"Gentlemen:

"Please pay to Ladd & Tilton Bank, this city, all
"monies now due and all that may become due on
"that certain contract between yourselves and the
"undersigned for the partition work in the New Lin-
"coln High School in this city. This order is meant
"to cover only as to payments and does not release

"the undersigned from any obligations assumed in the
"said contract.

"Yours very truly,

"SULLIVAN FIREPROOF PARTITION CO.

"J. D. Sullivan, Pres.

"A. C. Sullivan, V. Pres.

and Sec'y.

"Accepted,

"LEWIS A. HICKS COMPANY.

"By George Wagner, Mgr."

IV.

That the United States District Court for the District of Oregon erred in overruling the objection of counsel for plaintiff in error to the questions propounded to and the answers given by the witness A. C. Sullivan relative to the amount and character of the claims of the various unpaid materialmen and laborers. The objection of counsel for plaintiff in error was based upon the ground that none of the amounts testified to had been paid and the amount of indebtedness was not liquidated, that it was capable of ascertainment and being made certain, and that the witness should not be permitted to testify to unliquidated and contingent claims, and that the same was pleaded as an element of damages and was capable of being made definite and certain,, and that the same had not been reduced to a definite and certain amount so as to enable the same to be pleaded or testified to as an element of damages, and for the further reason that the same was incompetent, irrel-

evant and immaterial to any issues made and presented by the pleadings in this case and to any facts to be determined therefrom.

Counsel for the plaintiff in error then requested the court that it be considered as making objection to each and all of the testimony relating to any and all of said claims of laborers and materialmen which were unliquidated and uncertain and contingent the said objection to go to all of said testimony relating to any of said claims whatsoever, without making objection thereto, and the court then and there stated that the counsel for plaintiff in error should be considered as interposing an objection to each and all of said testimony as relating to any and all of said claims on account of the alleged unpaid creditors, laborers or materialmen of the Sullivan Fireproof Partition Co. The court stated that counsel would be deemed to have made formal objection to each and all of said testimony and that all objections would be overruled by the court and that the plaintiff should in each instance and to each question and answer have an exception thereto which would be and was duly allowed by the court.

The testimony so objected to is as follows:

Questions by Mr. Thomas:

Q. I will call your attention to the claim of the Acme Cement Plaster Company. Will you look at the book and see if there is anything there in connection with the Acme Cement Plaster Company?

A. Yes, sir, the book shows we are owing them

\$836.55.

Q. What was that for?

A. It was for plaster.

Q. Where was the plaster used?

A. It was used in making blocks.

Q. And those blocks were used in the Lincoln High School?

A. Lincoln High School building.

Q. Has this sum of \$836.55 been paid?

A. No, sir.

Q. That is still due the Acme Cement Plaster Company?

A. Yes, sir.

Q. That was for material furnished and used in the Lincoln High School Building?

A. Yes, sir.

Q. Now, will you refer to the Atlas Mixed Mortar Company?

A. We are owing them \$121.30.

Q. What for?

A. For sand and hauling.

Q. In what connection?

A. The Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention the name of the Portland Quarry Company.

A. We are owing them \$134.00 for hauling away rubbish from the Lincoln High School.

Q. Hauling rubbish away from the Lincoln High

School?

A. Yes, sir.

Q. In connection with your contract there?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the Columbia Contract Company.

A. We are owing them \$114.08.

Q. For what?

A. For sand furnished to the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Columbia Hardware Company.

A. We owe them \$30.22, as near as I was able to figure it out on the Lincoln High School. We bought hardware from different firms, and a part was delivered to our place on the east side, but as near as I could segregate it, we owe them \$30.22 on the High School.

Q. Do you happen to know the full amount you owe the Columbia Hardware Company?

A. We owe them in addition to the \$30.22—we owe them \$73.33.

Q. But that is not connected with these?

A. No connection with the school.

Q. Has that \$30.22 been paid?

A. No, sir.

Q. I call your attention to the claim of the East Side Transfer Company.

A. We owe them \$75.65.

Q. What is that for?

A. For hauling.

Q. Hauling of what?

A. Hauling blocks.

Q. To the Lincoln High School Building?

A. To the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of E. Hippeley.

A. That is still owing, \$32.35.

Q. What was that for?

A. That was for the rent of motors and some repair work, some wiring.

Q. In the Lincoln High School building?

A. In the Lincoln High School, yes, sir, incidental to this contract.

Q. Incidental to this contract. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Northwest Door Co.

A. We are owing them \$51.05.

Q. What was that for?

A. For some wood parts for our machinery as used at the Lincoln High School.

Q. What was that? Just explain so we can understand.

A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

Q. These blocks were hollow; is that the idea?

A. They were hollow and these wood cores were used for making the hollow part; after these blocks are molded in a machine, they are taken out and the wood cores were knocked out.

Q. Those are necessary things in the construction of these blocks?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Oregon Transfer Company.

A. We are owing them \$72.75.

Q. What was that for?

A. For hauling at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Portland Machinery Company.

A. We are owing them \$47.85. That is for—I think it was a fan and some dry kiln trucks used in the operation of drying the blocks.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

A. We owe them \$26.80 for power, and \$26.10 for

lights at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of George B. Rate.

A. We owe them \$13.75 for some plaster hair.

Q. Plaster hair?

A. Yes, sir.

Q. Was that used at the Lincoln High School?

A. Yes, sir, I think it was; as near as I can tell it was.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Union Oil Company.

A. We are owing them \$78.25.

Q. What was that for?

A. That is for coal oil furnished at the Lincoln High School.

Q. How was it used?

A. It was used as a sort of lubricant in knocking out these cores.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Western Lime & Plaster Company.

A. We owe them \$1285.91.

Q. What was that for?

A. For plaster.

Q. Used at the Lincoln High School building?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of Wright & Branch.

A. Wright & Branch—we owe them a balance of \$1400.00.

Q. A balance of \$1400.00?

A. Yes, sir.

Q. What for?

A. It is a balance due them on a sub-contract that they took from us for erecting partitions.

Q. In the Lincoln High School Building?

A. In the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the United States Steel Products Company.

A. We owe a balance of \$150.00.

Q. What was that for?

A. That is for wiring—wire—reinforcing wire.

Q. That is used in these blocks? A small wire?

A. A small chicken wire.

Q. Used as a reinforcement?

A. Yes, sir.

Q. That was used in these blocks used in the Lincoln High School?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Mr. A. C. Sullivan, on being cross examined by counsel for the plaintiff, relative to the foregoing testimony, testified as follows:

Questions by Mr. Hunt:

Q. Will you just turn to that book, the pages you had there, Mr. Sullivan, please.

A. Yes, sir.

Q. The Acme Cement Plaster Company, you testified for certain material. What was it? I couldn't understand.

A. That was plaster.

Q. And what was the Atlas Mixed Mortar Company?

A. That was sand and hauling.

Q. That was sand and hauling?

A. Yes, sir.

Q. Can you segregate the two items?

A. Well, hardly. I should say about half and half.

Q. About half and half?

A. That is a guess, though.

Q. And the Portland Quarry Company.

A. That was hauling the rubbish away from the building, broken blocks and the refuse from the floors.

Q. And the Columbia Contract Company?

A. That was for sand.

Q. Any transportation charges in that?

A. What? Hauling to the building, do you mean?

Q. Did they have any transportation charges in this amount you have here?

A. That included the cost of the sand delivered at the High School.

Q. And the Columbia Hardware Company?

A. Why for various forms of hardware we bought from them. Used tools of various kinds.

Q. Tools?

A. Tools, and—oh parts of machinery and parts of boilers and such as that.

Q. That was a part of your permanent equipment and plant, was it not?

A. Part of it was, yes.

Q. Did any part of that enter into the construction of the building?

A. No, the tools were only used in carrying out the work of construction, and the parts of the boilers were used in the boilers in the drying of material.

Q. Who purchased from the Columbia Hardware Company?

A. From them?

Q. Yes.

A. There was a foreman.

Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

A. Yes, sir.

Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the material used in making the blocks. This motor was used in driving that mixer.

Q. You rented a motor from him?

A. Yes, sir.

Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

Q. That was a part of the manufacture of the block, was it not?

A. Yes, a part of the process of making the block.

Q. Now the Oregon Transfer Company was for hauling?

A. Hauling, yes.

Q. Hauling the blocks?

A. Hauling the blocks to the building.

Q. Hauling the wood blocks or the plaster blocks?

A. No, the plaster blocks.

Q. The Portland Machinery Company I believe you said was for dry kiln trucks.

A. Dry kiln trucks, and I think for a fan, if I remember right.

Q. These trucks, just common trucks to put stuff on to carry around?

A. They call it a dry kiln truck; it is used as a part of a car that goes into the dry kiln to carry blocks.

Q. And the fan, what is that?

A. I am not so certain whether their bill included that fan, or whether or not we paid for it. We had a fan and bought it from them, I can't recall whether or not it was paid for.

Q. Then if this bill of \$47.85 does not include the fan, it is all for trucks?

A. Yes, sir, I think that is all we bought from them.

Q. Where are those trucks now?

A. They are over here in a basement where part of this machinery is.

Q. Part of your plant—part of your equipment, are they?

A. They are now, yes.

Q. They were then?

A. They were used as part of the equipment, yes.

Q. Now, the Portland Light & Power Company has a bill of \$52.90 for power and light. What was that power furnished for?

A. To drive the motor.

Q. To drive the motor?

A. Yes, sir.

Q. What motor—the Hippeley motor?

A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

Q. And the light was what?

A. Lights used around the place where we were working.

Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it

not?

A. Yes, sir.

Q. George B. Rate, he furnished plaster hair, is that it?

A. Yes, sir.

Q. Plaster Hair?

A. Yes, sir.

Q. Wright & Branch had a sub-contract for placing the partitions?

A. For placing the partitions.

Q. And the United States Steel Products Company for reinforcing?

A. For wire.

Q. Reinforcing wire?

A. Yes.

Q. Is there any man on this list, Mr. Sullivan, who furnished any material directly that went into the building, or wasn't the material that was furnished, furnished the Sullivan Fireproof Partition Company to be afterwards manufactured into stuff that went into the building?

A. The only thing that actually went into the construction of this building as far as we were concerned were these blocks.

Q. That is the thing you manufacture?

A. Yes, sir.

Q. That is the thing you agree to furnish in your contract?

A. We agreed to furnish and erect them.

Q. And erect them?

A. Yes, sir.

Q. And the stuff you speak of here was sold to your company individually in the course of your manufacture?

A. This was all sold to us to be used in making these blocks—I think, without going over each item.

Q. And do you know whether or not any material was furnished by these parties that went into blocks, which blocks were placed in any other buildings and other places, other than the Lincoln High School?

A. Yes, we had a surplus number of blocks from the school that were taken away and used on the Smith Hotel Building.

Q. Where is that?

A. I think called it Sixth and Main, if I remember right.

Q. That is in the City of Portland.

A. City of Portland, yes, sir.

Q. About how many was that, do you know?

A. Probably about ten thousand feet.

Q. About ten thousand feet?

A. Yes, sir.

Q. And I want to be perfectly sure that a portion of the material that you have testified to here went into these blocks that went into that Hotel at Sixth and Main.

A. Well, how we come to have these, in making blocks that we used in this school, in our machines we get three of the size used in the school and one smaller size, a three inch block used in ordinary par-

titions, and we had no use at the school for any number of these three inch, such as we would have in making a six inch. We had to provide a place of putting them; it was considered sort of a waste, that is, as far as the school was concerned, so we got this Smith job and hauled a considerable number there, but we were afterwards stopped from doing that by the Hicks Company and the architects, so we finished up delivering to that building from our place on the East Side.

V.

That the United States District Court for the District of Oregon erred in overruling and denying the motion, made by counsel for plaintiff in error at the close of all the testimony in said case, for a judgment on the pleadings and for a verdict and judgment upon the pleadings and testimony, which motion was based upon the following grounds:

“1. That the defense of estoppel as set forth in “the plaintiff’s reply was clearly established and that “the defendant Lewis A. Hicks Company was bound “by the written assignment of the Sullivan Fireproof “Partition Co. to Ladd & Tilton Bank, and the acceptance thereof by the Lewis A. Hicks Company, “dated the 18th day of December, 1911, and the written notification given by the said Lewis A. Hicks “Company, based on the written assignment and acceptance, which said written notification was dated “April 3, 1912, and that the facts and matters set “forth in the pleadings by the defendant did not con-

“stitute a defense to the matter of estoppel pleaded
“by the plaintiff.

“2. That the claims for materials furnished and
“labor done by the materialmen and laborers were
“contingent and uncertain; that the same was pleaded
“as a matter of defense and as damages; that the same
“were improper and insufficiently pleaded, and fur-
“ther were pleaded as uncertain and unliquidated
“damages and the same did not constitute a proper
“defense or any defense to the plaintiff’s action and
“the testimony admitted thereon was not properly
“received; that the said defense and allegations there-
“of and the testimony thereto should be disregarded.

“3. That the materials furnished by the material-
“men and the labor performed by the laborers was
“not such as would give rise to or sustain a mechanic’s
“lien in the State of Oregon.

“4. That inasmuch as the building which the
“Lewis A. Hicks Company had a contract to erect
“and was erecting was a public school building and
“could not be liened by materialmen or laborers the
“bond which the Lewis A. Hicks Company gave to
“insure the performance of its contract took the place
“of the building for the purpose of mechanics’ liens,
“and that if a mechanic’s lien could not have been
“successfully asserted against a building which would
“be lienable under the laws of the State of Oregon
“on account of materials or labor furnished, then such
“claim could not be successfully placed or filed
“against said bond, and further that no greater right

“or privilege was given by or could be asserted
“against the said bond than against a lienable build-
“ing under the laws of the State of Oregon.

“5. The testimony shows that all of the materials
“furnished to the Sullivan Fireproof Partition Co.,
“the sub-contractor, did not enter into the Lincoln
“High School building, the building which the Lewis
“A. Hicks Company was under contract to erect, and
“that under the laws of the State of Oregon relative
“to mechanics’ liens the various bills for labor and ma-
“terials were not capable of being asserted against
“the bond which took the place of the building for
“lien purposes.

“6. That the testimony shows that the materials
“furnished by the various materialmen and the labor
“performed by the various laborers for the Sullivan
“Fireproof Partition Co. on account of its sub-con-
“tract with the Lewis A. Hicks Company, was fur-
“nished and performed upon the credit of the Sullivan
“Fireproof Partition Co. and not upon the credit of
“the building or upon the credit of the bond, and fur-
“thermore that none of the materials furnished the
“Sullivan Fireproof Partition Co. entered into the
“said building, but the same were used for the purpose
“of manufacturing a new commodity, entire separate
“and distinct from the component parts thereof, and
“composed of the materials furnished by the various
“materialmen, and the whole character of the mate-
“rials being changed and commingled into a new and
“distinct manufactured article, they lost their orig-

"inal character to such an extent as to be non-liable
"items under the laws of the State of Oregon against
"the bond, the bond having taken the place of the
"building for the purpose of mechanics' liens."

VI.

That the United States District Court for the District of Oregon erred in making the following finding:

"Under the bond of Hicks & Company to the School
"District it and its surety became liable for the pay-
"ment of labor and material furnished to sub-con-
"tractors and which were used in the construction of
"the building, and to an action in the name of the
"State for the use and benefit of the labor and ma-
"terial claimants. (Sec. 6266 L. O. L., Hill vs. Amer-
"ican Surety Co., 200 U. S. 197, Smith vs. Mosier, 169
"Fed. 430.) The order and assignment from the Sul-
"livan Company to the plaintiff was subject and sub-
"ordinate to the terms of the contract between it and
"the defendant and their respective rights and liabil-
"ities thereunder. The plaintiff, therefore, knew or
"was chargeable with knowledge at the time it ac-
"cepted the order and assignment and made advances
"thereunder, that Hicks & Company was liable for
"the payment of claims for labor and material fur-
"nished the Sullivan Company in the performance of
"its contract."

VII.

That the United States District Court for the District of Oregon erred in making the following finding:

“The contention is made on behalf of the plaintiff
“(1) that Hicks & Company cannot assert as a de-
“fense to this action its liability for unpaid labor and
“material furnished the Sullivan Company until it
“has paid and discharged them. And (2) that its
“liability under its bond is for such claims only as
“could be made the basis of a mechanic’s lien if such
“lien could be filed against a public building.

“I am unable to concur in the first position and it
“is unnecessary to consider the other for, without
“detailing the evidence, it clearly shows that the un-
“paid material and labor claims for which liens could
“have been filed amount in the aggregate to more
“than the sum now claimed by the plaintiff. The
“statute (Sec. 6266) in pursuance of which Hicks &
“Company’s bond was given, provides that any person
“furnishing labor or supplying material for the con-
“struction of the building specified in the contract
“and bond may, when payment for the same has not
“been made, have a right of action and is authorized
“to bring suit in the name of the state for his use and
“benefit against the contractor and surety, and to
“prosecute the same to final judgment and execution.
“Hicks & Company and its surety were therefore per-
“sonally liable for unpaid labor and material claims
“of the Sullivan Company. The fact that such claims
“are still unpaid would be a good defense to an action
“by the Sullivan Company to recover on its contract,
“and the plaintiff stands in the place and stead of the
“latter, it is a proper defense to this action.”

VIII.

That the United States District Court for the District of Oregon erred in making the following finding:

“The principal contention of the plaintiff is that
“the defendant is estopped by its letter of April 3d,
“1912, from now asserting that there is not due and
“owing from it to the Sullivan Company the amount
“stated therein less the \$700.00. Assuming but not
“deciding that the letter amounted to a declaration
“by Hicks & Company that the sum of \$4300.00 was
“then due and payable to the Sullivan Company and
“that such sum would be paid the plaintiff in any
“event, and not a mere declaration that there was such
“a balance unpaid on the contract with the Sullivan
“Company, and assuming further that the plaintiff so
“understood it and relied thereon, there is no room
“for an application of the doctrine of estoppel because
“the undisputed facts show that the plaintiff was not
“thereby misled to its injury. It was no doubt lulled
“into inaction and in reliance thereon took no steps at
“the time to enforce its claim against the Sullivan
“Company, but the undisputed evidence is that the
“Sullivan Company was in no worse position finan-
“cially in May, when the defendant refused to make
“the payment than it was when the letter was writ-
“ten. The theory of an estoppel in pais is that one
“who by his acts or conduct has misled another to
“believe a given state of fact to be true and to act
“thereon, shall not be permitted to assert the con-

“trary to the injury of the person so acting. The
“important condition of the right to assert such estop-
“pel is the fact in addition to all others that the party
“pleading it must show that the attempted repudia-
“tion will work him injury by causing him to suffer
“a loss of some substantial character or that he was
“thereby induced to alter his position for the worse
“in some material respect. (16 Cyc. 744; Dickerson
“vs. Colgrove, 100 U. S. 578). Plaintiff was in no
“way injured by its delay in proceeding against the
“Sullivan Company, but its remedy against that com-
“pany was as full and complete in May, when the de-
“fendant refused payment, as it was when the letter
“of April 3rd was written. It was not injured on ac-
“count of the \$700.00 payment because it was made
“to pay claims which could have been asserted against
“it by the defendant, and moreover, it could not right-
“fully have applied such payment to its own account
“because it was made on the express understanding
“of all parties that it was to go to the discharge of
“labor and material claims.”

IX.

That the United States District Court for the Dis-
trict of Oregon erred in rendering judgment that the
plaintiff take nothing by its complaint and that the
same be dismissed, and erred in rendering judgment
against the plaintiff for costs, and erred in rendering
judgment in favor of the defendant and against the
plaintiff.

WHEREFORE, the plaintiff in error prays that

the judgment of the United States District Court for the District of Oregon be reversed.

WOOD, MONTAGUE & HUNT,
Attorneys for Plaintiff in Error.

[Endorsed]: Assignments of Error. Filed Aug. 21, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, a Bond on Writ of Error, in words and figures as follows, to wit:

[Bond on Writ of Error.]

(Title.)

KNOW ALL MEN BY THESE PRESENTS, That we, LADD & TILTON BANK, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and S. L. EDDY and C. B. WOODWORTH, are held and firmly bound unto LEWIS A. HICKS COMPANY, in the sum of Five Hundred Dollars to be paid to the said Lewis A. Hicks Company or its assigns, for which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 21st day of August, 1913.

WHEREAS, the above named Ladd & Tilton Bank

has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the District of Oregon;

NOW, THEREFORE, the consideration of this obligation is such that if the above named Ladd & Tilton Bank shall prosecute said appeal to effect, and answer all costs entered against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

LADD & TILTON BANK.

By W. H. DUNCKLEY,

Cashier.

S. L. EDDY. (SEAL)

C. B. WOODWORTH. (SEAL)

Signed, sealed and delivered in the presence of:

G. C. BLOHM.

TROY MYERS.

(Corporate Seal)

The foregoing bond approved, August 21, 1913.

R. S. BEAN,

Judge.

[Endorsed]: Bond. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals
for the Ninth District.*

LADD & TILTON BANK, a corporation,
Plaintiff in Error,
vs.

LEWIS A. HICKS COMPANY, a corporation,
Defendant in Error.

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To the Judge of the District Court of the United
States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean one of you, between Ladd & Tilton Bank, a corporation, Plaintiff and Plaintiff in Error, and Lewis A. Hicks Company, a corporation, Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the

same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS THE HONORABLE EDWARD
DOUGLAS WHITE,

Chief Justice of the Supreme Court of the
United States this 21 day of August, 1913.

A. M. CANNON,

Clerk of the District Court of the United
States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913,
there was duly filed in said Court, Citation on
Writ of Error, in words and figures as follows,
to wit:

[Citation on Writ of Error.]

*In the District Court of the United States for the
District of Oregon.*

LADD & TILTON BANK, a corporation,
Plaintiff,

vs.

LEWIS A. HICKS COMPANY, a corporation,
Defendant.

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To LEWIS A. HICKS COMPANY, a corporation,
and CHAMBERLAIN, THOMAS & KRAEMER
and LESTER W. HUMPHRIES, attorneys for
Lewis A. Hicks Company:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Ladd & Tilton Bank, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said district this 21st day of August, in the year of our Lord one thousand nine hundred and thirteen.

R. S. BEAN,

Judge.

Service of the within citation and receipt of copy thereof admitted this 21st day of August, 1913.

CHAMBERLAIN, THOMAS & KRAEMER,

Attorneys for defendant.

[Endorsed]: Citation. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Thursday, the 4 day of September, 1913, the same being the Judicial day of the Regular July, 1913, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

(Title.)

Now at this date, for good cause shown, it is ordered that the plaintiff's time for filing record and docketing this cause on the appeal thereof in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same hereby is enlarged and extended to and including the 21st day of October, 1913.

Judge.

[Clerk's Certificate.]

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, A. M. Cannon, Clerk of the United States District Court, District of Oregon, do hereby certify that the foregoing pages numbered 1 to 230, inclusive, contain and are a true transcript of the record and proceedings had in said court in the cause therein entitled Ladd & Tilton Bank, plaintiff, vs. Lewis A. Hicks Co., defendant, and contains in itself, and not by reference, all the pleadings, papers, files, orders

and journal entries in said cause in any manner relating to the final judgment entered therein, together with the opinion of the court, the petition for writ of error, order for writ of error, bond on writ of error, assignments of error, writ of error and citation thereon, as the same appear of record in my office and my official custody.

I further certify that the cost incurred by plaintiff in printing said record is \$.....

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, this day of, 1913.

.....
Clerk.

IN THE
United States Circuit Court
of Appeals
for the Ninth Circuit.

LADD & TILTON BANK, a Corporation
Plaintiff in Error

vs.

LEWIS A. HICKS COMPANY, a Corporation
Defendant in Error

Brief on Behalf of Plaintiff in Error

*Upon Writ of Error to the United States District
Court for the District of Oregon.*

STATEMENT

The pleadings in this cause have been fully set forth in the transcript of record filed herein, beginning at page 1 and ending on page 34 thereof.

In order to expedite the examination of this cause, we will set forth the issues presented upon the pleadings by recapitulation of the facts therein.

On the 25th day of June, 1912, Ladd & Tilton Bank, a corporation, filed a complaint against the Lewis A.

Hicks Company, a corporation, wherein, after alleging jurisdictional facts, it was alleged that the Lewis A. Hicks Company had entered into a contract with School District No. 1 of Multnomah County, Oregon, wherein the Lewis A. Hicks Company agreed to construct and erect a high school building for School District No. 1 aforesaid, the same being popularly known as the Lincoln High School. Thereafter, the defendant Lewis A. Hicks Company entered into a sub-contract with the Sullivan Fireproof Partition Co. wherein the Sullivan Fireproof Partition Co. was to do certain work in connection with the construction and erection of said building, at an agreed contract price of \$17,500. The Sullivan Fireproof Partition Company thereafter sought to borrow money from Ladd & Tilton Bank, and before making the loan Ladd & Tilton Bank required as security an assignment of all funds due from the Hicks Company to the Sullivan Fireproof Partition Co. on account of said contract. The assignment by the Sullivan Company and acceptance by the Hicks Company are in words and figures as follows, to wit:

“Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,
Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this city. This order is meant to cover only as to pay-

ments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,
Sullivan Fireproof Partition Co.,
J. D. Sullivan, Pres.,
A. C. Sullivan, V. Pres. and Sec'y.

Accepted,
Lewis A. Hicks Company,
By George Wagner, Mgn."

Thereafter, in recognition of such assignment, the Lewis A. Hicks Company paid to Ladd & Tilton Bank all moneys due to the Sullivan Fireproof Partition Company on account of said contract, save and excepting the last moneys due thereunder, to-wit: \$4300.00. After the Sullivan Fireproof Partition Co. had completed its contract with the Lewis A. Hicks Company, and on April 3, 1912, the Lewis A. Hicks Company notified the Sullivan Fireproof Partition Co. and Ladd & Tilton Bank that there was due on account of said contract between the Sullivan Company and the Hicks Company the balance of said contract price—to-wit: \$4300.00—of which sum the Hicks Company was willing to pay \$700.00 on said date and would pay the balance, \$3600.00, on May 1, 1912, the said notification of April 3, 1912, being in words and figures as follows, to-wit:

"April 3, 1912.

Sullivan Fireproof Partition Co., City,

Gentlemen: As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to

your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700, to be applied on accounts on the job, to be paid to Ladd & Tilton Bank.

Yours very truly,

Lewis A. Hicks Company,

FK:KT

By Fred A. Katz."

The complaint alleges that said assignment was duly accepted by the Hicks Company, and that Ladd & Tilton Bank, in reliance upon the assignment of December 18, 1911, loaned \$3500.00 to the Sullivan Company, and thereafter, by virtue of the notification of April 3, 1912, given by the Hicks Company, released the balance of said money earned by the Sullivan Company except \$3600.00 (principal and interest) then due Ladd & Tilton Bank; and that thereafter, and on or about May 1, 1912, Ladd & Tilton Bank made demand upon the Hicks Company for the payment of said \$3600.00, which payment was refused; and judgment was prayed for in that amount.

The defendant filed an answer wherein it admits the execution of the assignment dated December 18, 1911, described in the complaint, and admits that the Hicks Company paid Ladd & Tilton Bank all moneys as they became due under said contract, and admits the execution of the notification of April 3, 1912, and admits the payment on said last mentioned date to Ladd & Tilton Bank for the benefit of the Sullivan Company of \$700.00, as set forth in the complaint. And for a further defense it alleges that the Lewis A. Hicks Company en-

tered into a contract with School District No. 1 of Multnomah County, Oregon, for the construction of a school building known as the new Lincoln High School, and that, to comply with the law of the State of Oregon as set forth in section 6266 of Lord's Oregon Laws, the defendant, Lewis A. Hicks Company, executed its bond, as principal, in favor of said School District No. 1, with the Pacific Coast Casualty Company as surety thereon, a copy of which said bond is set forth at length in the answer; the intent and effect of the said bond being, among other things, that said contractor shall well and faithfully perform all the covenants, conditions and provisions of said contract, plans and specifications, and shall pay all claims or liens for labor, work and material on account of all sub-contractors, materialmen, laborers and mechanics furnishing labor or material under contract. The answer further alleges the execution of the contract with the Sullivan Fireproof Partition Co. and that the Sullivan Fireproof Partition Co. agreed to pay, promptly as they became due, all sums incurred for any work or labor done or materials furnished upon said building in connection with said contract. The answer further pleads the execution of the assignment by the Sullivan Company to Ladd & Tilton Bank, and alleges that the same was received by Ladd & Tilton Bank with full knowledge of the obligation of the Sullivan Company in reference to said work; but that thereafter the Sullivan Company was sued by Roebling & Sons Co. for \$214.99 and the Hicks Company garnished, and that thereafter under the writ of garnishment and the return thereon, the Hicks Company paid the amounts

recovered by Roebling Sons Co. in said action. It further alleges in defense that the Sullivan Company had numerous unpaid bills on account of said contract, said unpaid bills totaling \$4496.61, the list of the same being as follows:

Acme Cement Plaster Co.....	\$ 836.55
Atlas Mixed Mortar Co.....	121.30
Portland Quarry Co.....	134.00
Columbia Contract Co.....	114.08
Columbia Hardware Co.....	30.22
East Side Transfer Co.....	75.65
E. Hippeley.....	32.35
Northwest Door Co.....	51.05
Oregon Transfer Co.....	72.75
Portland Machinery Co.....	47.85
Portland Railway, Light & Power Co.....	52.90
George B. Rate.....	13.75
Union Oil Company.....	78.25
Western Lime & Plaster Co.....	1,285.91
Wright & Branch.....	1,400.00
United States Steel Products Co.....	150.00
<hr/>	
Total	\$4,496.61

The answer further alleges that the Sullivan Company is insolvent and is unable to pay said bills, and that the Hicks Company will be obligated to pay the same under its bond executed to School District Number 1; and that, owing to the fact of the unpaid bills of the Sullivan Company, there is now nothing due the Sullivan Company and consequently nothing due to Ladd & Tilton Bank.

The plaintiff filed a reply, wherein it admitted the contract between the Hicks Company and School Dis-

trict No. 1, and admitted the execution of the assignment dated December 18th, 1911, and the notification of April 3, 1912, but denied that the bond was executed pursuant to Section 6266, Lord's Oregon Laws, and denied that the Hicks Company or its surety was liable upon the bond to the unpaid creditors, laborers and materialmen of the sub-contractor, Sullivan; and, further replying to said answer, alleged the execution of the assignment dated December 18th, 1911, and the notification dated April 3, 1912, and further alleged that at the time of the notification of April 3, 1912, wherein the Hicks Company notified Sullivan, and Ladd & Tilton Bank, that the contract had been completed and that \$4300 was due thereunder, which would be paid on May 1st, 1912, of which amount the Hicks Company was willing to pay \$700 at that time, was made by the Hicks Company with the knowledge that the sub-contractor Sullivan had numerous unpaid creditors, laborers and materialmen, which knowledge was not known or given to Ladd & Tilton Bank; and that by reason thereof Ladd & Tilton Bank was lulled into a position of false security and released the said \$700 and awaited the further payment of said contract price as mentioned in said notification of April 3d; and that the Hicks Company, by so making such statements with knowledge of the falsity thereof, ought to be and was estopped from asserting as an offset or counterclaim the unpaid accounts of the sub-contractor Sullivan in defense to the action instituted by Ladd & Tilton Bank under the assignment. The estoppel and the facts relative thereto were pleaded at length in the reply of Ladd & Tilton

Bank, and reference to this and all the other pleadings, as contained in the transcript of record, is hereby made for greater particularity.

Complaint	Transcript, page	1
Answer	“ page	7
Reply	“ page	18
Contract between Hicks and School District No. 1.....	“ page	184
Surety bond given by Hicks to School District No. 1.....	“ page	29
Sub-contract between Hicks and Sullivan	“ page	165

POINTS AND AUTHORITIES

I.

Moneys in the hands of one who has accepted an assignment thereof are not subject to garnishment.

Harrison vs. Louisville & N. R. Co., 23 So. (Ala.) 790.

Emery vs. Lawrence, 8 Cush., 62 Mass. 151.

Wellborn v. Buck, 21 So. (Ala.), 786.

Quigley v. Welter, 104 N. W. (Minn.), 236.

II.

A surety bond conditioned to save harmless the owner of a building from liens or other claims is not violated by the incurrence of claims and liens for which such owner is not liable.

Smith v. Bowman, 88 Pac. (Utah), 867, 9 L. R. A. (N. S.), 889.

Hunt v. King, 97 Iowa 88, 66 N. W. 71.

Spalding Lumber Company v. Brown, 171 Ill. 487, 49 N. E. 725.

Montgomery v. Reif, 15 Utah 495, 50 Pac. 623.

Simonson v. Grant, 36 Minn. 439, 31 N. W. 861.

Green Bay Lumber Co. v. Independent School District, 121 Iowa 663, 97 N. W. 72.

Editor's Note 9 L. R. A. (N. S.) 889.

School District No. 6 v. Smith, 63 Ore. 586.

III.

A surety bond covenanting to save harmless the obligee from liens and other charges is a bond for indemnity against damage and is not a bond for indemnity against liability.

Henry v. Hand, 36 Ore. 492, 27 Cyc. 309.

Carson Opera House v. Miller, 16 Nev. 324.

Church v. Conlin, 11 Pa. Superior Court 413, 8 Am. & Eng. Enc. of Law, 2d Ed. 180.

IV.

A public building in Oregon is not lienable.

Portland Lumbering and Manufacturing Co. v. School District No. 1, 13 Ore. 283.

Benbow v. The James Johns, 56 Ore. 554.

Construction of the Congressional Enactment known as Act. Aug. 13, 1894, Comp. Stat. 1901, p. 2523, as amended Act. Feb. 24, 1905, Comp. Stat. 1901.

United States for the Use of Hill v. American Surety Company, 26 Supreme Ct. Rep. (U. S.) 168.

United States Fidelity & Guaranty Co. v. United States, 24 Sup. Ct. Rep. 142.

Smith v. Mosier, 169 Fed. 430.

United States v. Ansonia Brass & Copper Co., 31 Sup. Ct. Rep. 49.

V.

General lien laws of the State of Oregon and judicial interpretations thereof.

Sec. 7416 L. O. L. *et seq.*

Fitch v. Howitt, 32 Ore. 396, 52 Pac. 192.

Harrisburg Lbr. Co. v. Washburn, 29 Ore. 164, 44 Pac. 390.

Dalles Lumber Co. v. Woolen Manufacturing Co., 3 Ore. 527.

Kezartee v. Marks, 15 Ore. 529, 16 Pac. 407.

Williams v. Toledo Coal Co., 25 Ore. 426, 36 Pac. 159.

Allen v. Elwert, 29 Ore. 444, 44 Pac. 824.

Hughes v. Lansing, 34 Ore. 124, 55 Pac. 95.

Jones on Liens, sec. 1337.

VI.

He who by his language or conduct leads another to do what he would not otherwise have done, cannot subject such person to loss or injury by disappointing the expectations upon which he acted. Such action or conduct creates an estoppel in pais.

Federal Case No. 14099, Vol. 24, Fed. Cases.

Kirk v. Hamilton, 102 U. S. Sup. Ct. 68.

Dickerson v. Colgrove, 100 U. S. 578.
 Misner v. Russell, 29 Mich. 229.
 Conway National Bank v. Pease, 82 Atl. 1068.
 Seymour v. Oelrichs, 106 Pac. 88.
 Swain v. Seamens, 9 Wallace 254 at p. 274.
 Jones v. Subera, 126 N. W. 253.
 Jaques v. Esler, 4 N. J. Eq. 461.
 Carruthers v. Whitney, 105 Pac. 831.
 Note "d" 134 Am. St. Rep. p. 177.

VII.

Materials must be furnished with special reference to their use in a particular building in order to secure the protection of the mechanic's lien law.

Jones on Liens 2d Ed. sec. 1326, also sec. 1330,
 59 Ga. 653.

ARGUMENT

ASSIGNMENTS OF ERROR I, II and III.

Inasmuch as assignments of error 1, 2 and 3 (transcript of record, pp. 197-203, inclusive,) are related one to the other, the same will be discussed together under this heading.

The contention of counsel for the plaintiff in error is as follows: The Hicks Company and the Sullivan Company entered into a contract whereby the Sullivan Company as sub-contractor was to do certain work on the Lincoln High School at a fixed consideration. At or shortly after the execution of the contract, on December 18, 1911, the Sullivan Company assigned to Ladd & Tilton Bank all moneys due or to become due under

said contract, which assignment was duly served on the Hicks Company and accepted by it. Thereafter the Sullivan Company undertook to do the work mentioned in its sub-contract, and thereafter and after the date of the assignment to Ladd & Tilton Bank, which was accepted by the Hicks Company, the Sullivan Company was sued by Roebling's Sons Company in the Justice's Court of Portland, Multnomah County, Oregon, for \$214.99, and after the institution of the action the Hicks Company was served with a writ of garnishment therein and for answer to the writ of garnishment the Hicks Company evidently returned that the sum for which the Roeblings Sons Company was seeking judgment was due the Sullivan Company and in its hands, for the claim of Roeblings Sons Company was subsequently reduced to judgment and the amount was paid by the Hicks Company pursuant to the writ of garnishment. These facts appear in paragraph 12 of the defendant's answer (transcript of record, page 15). At the time of the trial evidence was offered to sustain the allegations of the answer as above referred to, and the evidence developed that the Sullivan Company was sued by the Roeblings Sons Company after the date of the assignment by the Sullivan Company to Ladd & Tilton Bank and the acceptance thereof by the Hicks Company, and that the Hicks Company, notwithstanding such assignment and acceptance, returned, under a writ of garnishment, that it had in its hands moneys due the Sullivan Company sufficient to take care of the amount of such claim. Objection was made to said evidence, which was overruled by the court; and a motion was made to strike

the said testimony from the record, which was also denied by the court. The evidence offered is set forth in the assignments of error, at pages 197 to 202 of the transcript of record.

We contend that the assignment to Ladd & Tilton Bank by the Sullivan Company of all moneys due it arising by virtue of its sub-contract with the Hicks Company, of which assignment the Hicks Company had notice and expressly accepted the same, made wrongful any return of the Hicks Company on the writ of garnishment that anything was due the Sullivan Company, and that anything paid by virtue of said writ was wrongfully paid and could not be made a matter of defense to the claim of this plaintiff.

In support of this contention the following authorities are cited:

Harrison v. Louisville & N. R. Co. 23 Southern (Ala.) 790.

“Where an employer arranges with a merchant (the employee consenting) to withhold from his future earnings each month enough to cover the amount due for provisions furnished him, not to exceed a specified sum for any one month, such amount in the hands of the employer is not the subject of garnishment by third persons.”

In the case of Emery v. Lawrence et al., 8 Cushing, 62 Mass. 151, garnishment was served on a fund which had been previously assigned. The court held that where a workman in the employment of a manufacturing company made an assignment of wages due and which

would thereafter become due to him, to a certain date, in consideration of being indebted to the assignee and an undertaking on the part of the latter to supply his family with groceries from time to time as his family might need them, the assignment, in the absence of fraud, was valid and transferred to the assignee all the assignor's interest in his wages for the time specified, and that such sum was not subject to garnishment.

In the case of *Wellborn v. Buck*, 21 Southern (Ala.) 786, garnishment was served upon a sum which had been assigned, and the court held that the assignment being a good and valid assignment as to all funds which might be earned, even though the employment was contingent upon the happening of an event, the rights of the assignee therein were superior to any rights which the creditors of the assignor could assert.

In the case of *Quigley v. Welter*, 104 N. W. (Minn.) 236, the assignor made an assignment of certain funds to be earned by him, to cover an existing and accruing indebtedness. At the time of the assignment the assignor was indebted to the attaching creditor in the sum of \$123, and this creditor brought suit therefor and garnished the funds in the hands of the employer. The court held that the attaching creditor could take nothing, for all the funds in the hands of the person garnished had already been assigned and the person garnished had notice thereof and could not make a return of funds in his hands belonging to the assignor.

It is to be noted that the rule contended for with reference to the assignment being discussed is clearly deducible from the cases herein cited. The funds in the

hands of the Hicks Company belonging to the Sullivan Company had been assigned by the Sullivan Company to Ladd & Tilton Bank, and the assignment thereof had been accepted by the Hicks Company; and the Hicks Company, upon the service of the writ of garnishment, was obligated to return that there was nothing due the Sullivan Company. If the Hicks Company carelessly interfered in the relation created by this assignment and voluntarily paid money over to a creditor of the Sullivan Company, which the Sullivan Company was not entitled to receive and which did not belong to it, then such action on the part of the Hicks Company was not authorized or justified by the admitted facts in this case and is no defense to plaintiff's claim.

It is submitted that the court committed error in receiving evidence of any money paid out by the Hicks Company under a writ of garnishment and allowing a deduction thereof to be made as against the assignment in the hands of Ladd & Tilton Bank, and that such sum paid out by the Hicks Company was not a proper item of offset or counterclaim.

ASSIGNMENT OF ERROR IV AND VI.

For the purpose of brevity and clearness we will combine assignments of error 4 and 5 (transcript of record, pp. 203-220 inclusive) under the argument which follows, these two assignments relating to the same general subject.

We desire to particularly direct the attention of the court to the arguments which follow hereunder, for we believe the same to be of the utmost importance and value, if not paramount to all others in deciding this case.

Assignment of error 4 (transcript of record, p. 203) relates to the admission by the trial court, over objection of counsel for plaintiff in error, of the testimony of A. C. Sullivan in reference to the unpaid claims outstanding and owing by him, alleged to have been incurred in connection with his sub-contract for the partition work in the new Lincoln High School. The testimony will be adverted to in greater detail hereafter.

Assignment of error 5 (transcript of record, p. 217) relates to the ruling of the trial court in denying the motion of plaintiff in error for a verdict and judgment on the pleadings and testimony, which motion was based upon the following grounds:

“1. That the defense of estoppel as set forth in “the plaintiff’s reply was clearly established and “that the defendant, Lewis A. Hicks Company, was “bound by the written assignment of the Sullivan “Fireproof Partition Co. to Ladd & Tilton Bank, “and the acceptance thereof by the Lewis A. Hicks “Company, dated the 18th day of December, 1911, “and the written notification given by the said Lewis “A. Hicks Company, based on the written assign- “ment and acceptance, which said written notifica- “tion was dated April 3, 1912, and that the facts “and matters set forth in the pleadings by the de- “fendant did not constitute a defense to the matter “of estoppel pleaded by plaintiff.

“2. That the claims for materials furnished
 “and labor done by the materialmen and laborers
 “were contingent and uncertain; that the same was
 “pleaded as a matter of defense and as damages;
 “that the same were improper and insufficiently
 “pleaded, and further were pleaded as uncertain and
 “unliquidated damages and the same did not consti-
 “tute a proper defense or any defense to the plain-
 “tiff’s action and the testimony admitted thereon
 “was not properly received; that the said defense
 “and allegations thereof and the testimony thereto
 “should be disregarded.

“3. That the materials furnished by the ma-
 “terialmen and the labor performed by the laborers
 “was not such as would give rise to or sustain a me-
 “chanic’s lien in the State of Oregon.

“4. That inasmuch as the building which the
 “Lewis A. Hicks Company had a contract to erect
 “and was erecting was a public school building and
 “could not be liened by materialmen or laborers, the
 “bond which the Lewis A. Hicks Company gave to
 “insure the performance of its contract took the
 “place of the building for the purpose of mechanics’
 “liens, and that if a mechanic’s lien could not have
 “been successfully asserted against a building which
 “would be lienable under the laws of the State of
 “Oregon on account of materials or labor furnished,
 “then such claim could not be successfully placed
 “or filed against said bond, and further that no
 “greater right or privilege was given by or could be
 “asserted against the said bond than against a lien-
 “able building under the laws of the State of Ore-
 “gon.

“5. The testimony shows that all of the mate-
 “rials furnished to the Sullivan Fireproof Partition

“Co., the sub-contractor, did not enter into the Lincoln High School building, the building which the Lewis A. Hicks Company was under contract to erect, and that under the laws of the State of Oregon relative to mechanics’ liens the various bills for labor and materials were not capable of being asserted against the bond which took the place of the building for lien purposes.

“6. That the testimony shows that the materials furnished by the various materialmen and the labor performed by the various laborers for the Sullivan Fireproof Partition Co. on account of its sub-contract with the Lewis A. Hicks Company, was furnished and performed upon the credit of the Sullivan Fireproof Partition Co. and not upon the credit of the building or upon the credit of the bond, and furthermore that none of the materials furnished the Sullivan Fireproof Partition Co. entered into the said building, but the same were used for the purpose of manufacturing a new commodity, entirely separate and distinct from the component parts thereof, and composed of the materials furnished by the various materialmen, and the whole character of the materials being changed and commingled into a new and distinct manufactured article, they lost their original character to such an extent as to be non-lienable items under the laws of the State of Oregon against the bond, the bond having taken the place of the building for the purpose of mechanics’ liens.”

In order that the examination by the court of the question here presented may be facilitated, we desire to refer briefly to the pleadings.

The complaint states that Lewis A. Hicks Company entered into a contract with School District No. 1 of Multnomah County, Oregon, for the erection of a public school building, commonly known as the Lincoln High School; and that Lewis A. Hicks Company entered into a sub-contract with the Sullivan Fireproof Partition Co. whereby the Sullivan Company was to do certain work and furnish certain materials. The Sullivan Company applied to Ladd & Tilton Bank, the plaintiff in error, for a loan for the purpose of complying with its sub-contract; but before making the loan, Ladd & Tilton Bank required an assignment of all moneys due the Sullivan Company from the Hicks Company on account of the contract price mentioned in said contract. The assignment was duly and regularly given by the Sullivan Company to Ladd & Tilton Bank, and notice thereof was served on the Hicks Company and accepted by it.

The defendant Hicks Company answered, admitting certain of the allegations of the complaint which are immaterial to the discussion of this point, and for a further answer set up the facts that the Lewis A. Hicks Company entered into the agreement with School District No. 1 for the construction of a public school building known as the Lincoln High School, and further alleges by paragraph VI. of the answer (transcript of record, pages 9, 10 and 11) that upon the demand of said School District No. 1 AND IN COMPLIANCE WITH THE LAWS OF THE STATE OF OREGON, AS SET FORTH IN PARAGRAPH 6266 OF LORD'S OREGON LAWS, THE DEFEND-

ANT, LEWIS A. HICKS COMPANY, IN CONNECTION WITH SAID CONTRACT EXECUTED ITS BOND AS PRINCIPAL IN FAVOR OF SAID SCHOOL DISTRICT NO. 1, WITH THE PACIFIC COAST CASUALTY CO. AS SURETY THEREON, of which bond (transcript of record, p. 10) the following is material. The bond recites that the Hicks Company is bound unto School District No. 1 of Multnomah County, Oregon, in the penal sum of \$160,000, conditioned that whereas the Lewis A. Hicks Company has entered into a contract with School District No. 1 of Multnomah County, Oregon, for the erection of a school building known as the new Lincoln High School, and then proceeds:

“Now, therefore, if the said contractor shall well and
 “faithfully perform all the covenants, conditions and
 “provisions in said contract, plans and specifications,
 “and shall pay all claims or liens for labor, work and
 “material on account of all sub-contractors, material-
 “men, laborers and mechanics furnishing labor or ma-
 “terial under said contract and all claims for damages
 “against the owner on account of personal injury to any
 “persons working on or about said structure, then this
 “obligation shall be void; otherwise to remain in full
 “force and virtue.” Said contract between School District No. 1 and Hicks is referred to in said bond and made a part of same by a copy being attached thereto.

Paragraph XIII of the answer (transcript of record, page 16) alleges that the following named persons and corporations performed labor and furnished material to the Sullivan Fireproof Partition Co. to be used

and which was used in the matter of the partial construction of said building by the said Sullivan Fireproof Partition Co., under and by virtue of its contract with the defendant, and that there is now unpaid and owing to the said persons and corporations by the said Sullivan Fireproof Partition Co. on account thereof the amounts set opposite their respective names, to-wit: (Same as set forth in answer, transcript of record, p. 16.)

Paragraph XIV. alleges:

“That the Sullivan Fireproof Partition Co. is
 “insolvent and is unable to pay to said persons and
 “corporations the said amount of Four Thousand
 “Four Hundred Ninety-six and Sixty-one Hun-
 “dredths Dollars (\$4,496.61), or any part thereof,
 “and that the said persons and corporations are
 “claiming from the defendant under its bond so ex-
 “ecuted to School District No. 1 of Multnomah
 “County, Oregon, the said aggregate sum of Four
 “Thousand Four Hundred Ninety-six and Sixty-
 “one Hundredths Dollars, (\$4,496.61), and that a
 “portion of said corporations have already insti-
 “tuted an action against the defendant upon said
 “bond and that defendant is liable for and will be
 “compelled to pay to said persons and corporations
 “the said sum of \$4,496.61.”

Paragraph XV alleges:

“That owing to the failure of said Sullivan Fire-
 “proof Partition Co. to pay to said persons and cor-
 “porations the said sum of Four Thousand Four
 “Hundred Ninety-six and Sixty-one Hundredths
 “Dollars (\$4,496.61), the defendant has paid all
 “moneys due, or to become due, to said Sullivan

“Fireproof Partition Co., and that there was not at
 “the commencement of the above entitled action, nor
 “is there now anything due, owing or payable by the
 “defendant to said Sullivan Fireproof Partition Co.,
 “and that consequently there is nothing due, owing
 “or payable from defendant to plaintiff by virtue of
 “said order.”

Replying to the answer of the defendant, as quoted, the plaintiff denies that said bond was executed pursuant to section 6266 of Lord's Oregon Laws, or any other section of said code. The reply further denies the allegations of paragraphs XIII, XIV and XV, of the answer. Therefore, an issue was clearly made upon the pleadings as to whether or not said \$160,000 bond executed by the Hicks Company to School District No. 1 was executed pursuant to section 6266 of Lord's Oregon Laws; and in the trial of this case, there being a full transcript of all the evidence taken, as set forth in the transcript and now before this court, the Hicks Company did not undertake at any time to prove the allegation of its answer that the bond was executed pursuant to section 6266 of L. O. L. Not one particle of evidence was received on this point, and none was offered by the Hicks Company. Therefore, the defendant Hicks Company, having made this affirmative allegation, which was denied by the plaintiff, and the issues squarely presented, the burden is on the Hicks Company to prove the allegation by the preponderating evidence; and in the absence of any proof whatsoever as to said issue, we do not believe the court is empowered to find that said bond was executed pursuant to said section

6266 of Lord's Oregon Laws. Lord's Oregon Laws has other provisions relating to surety companies and the execution of bonds and we submit that the trial court is in error in picking out any one particular provision of the Oregon Code and finding that a bond was or was not given under that particular provision when no evidence on the subject was introduced. We submit that this bond of the Hicks Company must be interpreted in the light of its own language and in the language of the contract which is annexed thereto and made a part thereof, irrespective of whatever is claimed by the Hicks Company, but not sustained by the evidence, as to the effect thereon of any code provision.

It is to be especially noted that nowhere in the contract or in the bond itself is it mentioned or provided that the bond is or shall be conformable to section 6266 of L. O. L., and that at no place is it mentioned or provided that a bond shall be executed complying with the provisions of said or any code section. Therefore, we submit that in the construction of the bond, the correlative rights and duties arising thereunder are to be interpreted in the light of a voluntary instrument drawn between the parties entering into a contract.

We desire to refer the court to the defendant's exhibit "A" (being a copy of the contract between the Hicks Company and School District No. 1 relative to the construction and erection of the new Lincoln High School), as the same is set forth in the transcript of record, beginning at page 184. The contract, after making certain provisions as to the doing of the work and the manner thereof, provides on page 190 as follows:

“If at any time there shall be evidence of any
 “lien or claim for which, if established, the owner of
 “the said premises might become liable, and which is
 “chargeable to the contractor, the owner shall have
 “the right to retain out of any payment then due or
 “thereafter to become due an amount sufficient to
 “completely indemnify _____ against such
 “lien or claim. Should there prove to be any such
 “claim after all payments are made, the contractor
 “shall refund to the owner all moneys that the latter
 “may be compelled to pay in discharging any lien
 “on said premises made obligatory in consequence
 “of the contractor default.”

And on page 192 the provision relating to the bond is as follows:

“And the party further agrees to give a surety
 “bond in the sum of One Hundred and Sixty Thou-
 “sand and no-100 Dollars (\$160,000.00) for the
 “faithful performance of this contract.”

It will be noted that there is no provision in the contract whatsoever relative to the contractor, Hicks Company, paying all claims incurred on account of labor and material furnished for the high school building, irrespective of whether such labor and material shall be supplied to the contractor (Hicks Company) or any sub-contractor. But the express language of the contract is: “If at any time there shall be evidence of any
 “lien or claim for which, if established, the owner of the
 “said premises might become liable.” The clear intent of this provision of the contract is to INDEMNIFY SCHOOL DISTRICT NO. 1 AGAINST ALL

DAMAGE which might be asserted against School District No. 1 on account of the labor and material furnished to the principal contractor, Hicks Company; and it was for the faithful performance of this contract, and particularly this provision, that the bond referred to in the answer was given. And particularly does the bond amplify and explain this when it states that if the contractor shall well and faithfully perform all the covenants, conditions and provisions in said contract, plans and specifications, and shall pay all *claims or liens* for labor, work and material on account of all sub-contractors, materialmen, laborers and mechanics furnishing labor or material, then the bond shall be void and there shall be no remedy over as against the surety.

We are endeavoring to urge upon this court that the intent of the contract, as construed from its four corners, is that the Hicks Company shall save School District No. 1 harmless from all claims and liens on the part of laborers or materialmen, and that this is the obligation which the surety in the Hicks bond has assumed; to-wit: That Hicks Company shall pay all claims and liens for labor, work or material and all claims *for damages against the owner*, School District No. 1. We submit that at no place in the contract itself between Hicks Company and School District No. 1, and at no place in the bond itself (to-wit, the bond given by Hicks to School District No. 1) is it provided or even mentioned that the contract or the bond was executed for the purpose of fulfilling any intent expressed in Lord's Oregon Laws, section 6266; and that if no claim or lien by any laborer or materialman can be asserted against School

District No. 1, either by a mechanics' lien or by a direct suit by such laborer or materialman, then the surety in the bond has discharged his contract by the faithful performance thereof; and it will be admitted that a laborer or a materialman, not being in privity of contract with School District No. 1, cannot sue School District No. 1 for any claim which he might have on account of labor or material furnished to Hicks, the contractor, or Sullivan, the sub-contractor. And it being further provided by the law of Oregon that a public building is non-lienable for labor or material, then clearly no right of action can possibly exist on the part of such laborer or materialman. It is to be especially noted that the bond given by Hicks and his surety to School District No. 1 is a bond for *indemnity against damages*, and that damages could only arise to School District No. 1 after it had been compelled to pay out something to a mechanic or materialman on account of the construction of the new Lincoln High School, and that if School District No. 1 is not compelled to make such payment it cannot claim damages and has no right of action against the surety. This being true, and it being nowhere proved in the evidence upon the issues made in the pleadings that the bond was executed to serve the purpose of the Oregon Law as expressed in section 6266 of Lord's Oregon Laws, it is submitted that if the laborer or materialman could not obtain redress for unpaid services or material furnished either to Hicks or Sullivan under the bond executed by Hicks, then the fact of the execution of the bond is immaterial in this case, and any payment which the Hicks Company made to the laborers or material-

men furnishing labor or material to its sub-contractor is a voluntary payment made without right so to do, and could not be pleaded as a defense. Upon the point under discussion we desire to refer the court to the terms of the sub-contract entered into between the Sullivan Company and the Hicks Company, as set forth in the transcript of record, at page 165; and particularly to paragraph numbered X. thereof, wherein the following provision occurs:

“The sub-contractor agrees to save and keep the
 “said building and premises free and clear of any
 “and all mechanics’ liens for work or labor done or
 “materials furnished in the doing of the work speci-
 “fied herein, and in this connection the sub-con-
 “tractor agrees to pay promptly as they become due
 “all sums incurred for such work or labor done or
 “materials furnished, and in case of any default on
 “the part of the sub-contractor, the contractor shall
 “have the right to pay said sums, together with any
 “additional sums the payment of which is necessi-
 “tated by such default of the sub-contractor, either
 “for costs, attorney’s fee or otherwise, and all sums
 “so paid by the contractor shall be repaid by the sub-
 “contractor, and the contractor may withhold any
 “money due the sub-contractor until such indebt-
 “edness is repaid and the contractor may declare
 “this contract rescinded, resume possession of the
 “premises, complete the work and charge the same
 “against the sub-contractor, all in the manner and
 “with the same rights as are provided in subdivision
 “V hereof.”

We cannot but be impressed with the trend of thought which runs throughout the contract between

the Hicks Company and School District No. 1, the bond between the Hicks Company and School District No. 1, and the contract between Sullivan and the Hicks Company, which is, that School District No. 1 is to be saved harmless from all charges and liens which it might have to pay, and the Hicks Company as against its sub-contractor, is to be saved harmless against all liens for work or materials which might be incurred by Sullivan in the course of the performance of his contract for which the Hicks Company would be liable under its surety bond to School District No. 1.

The particular point which we are urging upon the court has been decided in the case of *Smith v. Bowman*, 88 Pac. (Utah) 867, and reported in 9 L. R. A. (N. S.), at page 889, together with an extended editor's note. In that particular case the State Agricultural College of Utah entered into a contract with the defendants Bowman & Hodder for the construction of a college building. The contract provided, as in the case at bar, that the contractor should pay all claims of laborers and materialmen and should, among other things, keep the building free from all liens or right of lien for debts due or claimed to be due from the contractor; and as security for the performance of the contract on the part of the contractor, the owner took a surety bond in the penal sum of \$22,000, which penal bond was conditioned, as in the case at bar, that the contractor would truly and well keep and perform the covenants and agreements in the contract, and further that the contractor would truly and promptly pay and discharge all indebtedness that might be incurred by him in carrying out the said

contract, and would complete the same free of all mechanics' liens, "and shall keep and perform the covenants, conditions and agreements in said contract and in the within instrument contained;" it being provided also "that the bond was made for the use and benefit of all persons who may become entitled to liens under the said contract according to the provisions of the law in such cases made and provided, and may be sued upon by them as if executed to them in proper person."

The action was brought by the plaintiff, who had supplied material to the contractor. Under the law of Utah (the state wherein the public building was to be erected) no lien could be filed against a public building. Such also is the law of the State of Oregon.

We would ask the court to read the entire opinion, as it is very illuminating upon this question. The court said:

"In determining the true intention of the parties to the bond in question, we must look not to disconnected sentences, or only a portion of a sentence, taken from the context, but we must look at the bond as a whole, and consider it in connection with the contract attached to it and for the security of which it was given. So construing it, we think it is apparent that the intention of the parties to the bond was to secure the college against claims that might be asserted against it, and for which liens might be filed, and to secure those who might become entitled to liens. There is no provision in the contract entered into between the college and the contractors whereby the latter promised or agreed to pay for material furnished to them. The parties to the bond had the undoubted right to contract

"as to who should and who should not be benefited
 "by its obligations. They have expressed in clear
 "terms those persons to be the agricultural college
 "and those who may be entitled to liens. Such inten-
 "tion is manifest by what may be called the obliga-
 "tory portion of the bond, where it is expressly stated
 "that the sureties are bound to the agricultural col-
 "lege, 'as well as to all persons who may become en-
 "titled to liens under the contract,' in a sum of
 "money 'to be paid to the said agricultural college
 "and to said parties who may become entitled to
 "liens;' and in the concluding portion of the bond,
 "where again it is expressly stated: 'This bond is
 "made for the use and benefit of all persons who
 "may become entitled to liens.' When the parties
 "to the bond limited the benefits for which it was
 "given in express terms to third parties who may
 "become entitled to liens, to then hold that the bond
 "shall be extended, so as to include those who are
 "not entitled to liens, is to read a condition into the
 "bond other than expressed by the parties, and is
 "extending by implication the liability of the sure-
 "ties beyond the terms of their contract, and is, in
 "effect, making a new contract for them. But it is
 "said, as all persons are presumed to know the law,
 "it will be presumed that the sureties knew that un-
 "der the statute no one was entitled to liens, and
 "that, therefore, they must have intended to benefit
 "those who would have been entitled to liens had the
 "building not been a public building. The premises
 "may be conceded, but the conclusion does not neces-
 "sarily follow. It may well be argued that the sure-
 "ties, mindful of the law that mechanics' liens can-
 "not be filed against a public building and that
 "claims of materialmen and laborers arising from

“materials furnished to or labor performed for the
 “contractors could not lawfully be asserted against
 “the college, and also mindful of the law that sure-
 “ties are entitled to stand on the strict letter of their
 “bond, signed the undertaking in question; and that
 “they would not have signed it had it expressly se-
 “cured the payment to those who might furnish
 “material and labor to the contractors in no man-
 “ner chargeable to or capable of being asserted
 “against the college. If, on the other hand, it shall
 “be said that the parties to the bond erroneously
 “assumed that materialmen and laborers were enti-
 “tled to liens, and had the right to file liens against
 “the building, or assert claims against the college
 “arising from material or labor furnished to the con-
 “tractors, and, upon such assumption, secured the
 “college against such claims and liens and those en-
 “titled to liens, then, again, the parties can only be
 “held to what was intended by them and the security
 “enforced only in accordance with such intention.
 “To say that the parties merely intended to secure
 “the college against liens and those entitled to liens
 “and because no lien attached and no one was enti-
 “tled to liens that therefore the terms of the bond
 “should be extended so as to include by implication
 “some one else not entitled to liens, is making an-
 “other contract for the parties. It is said by appel-
 “lant that the parties intended to secure some one
 “beside the agricultural college. Suppose they did.
 “They, however, have stated who it is in very plain
 “language. It is those who are entitled to liens. But
 “the appellant asserts as no one was entitled to liens
 “the parties to the bond must have meant those who
 “might furnish material and labor to the contractor.
 “Of course that fits the plaintiff but it does not fit

"the terms of the bond. Whom the sureties meant
 "to be benefited is to be determined from the lan-
 "guage which they have used; and in order that the
 "plaintiff may be one of the class described in the
 "bond he must bring himself within its terms. He
 "must make himself fit the class, not make the class
 "fit him. What the appellant in effect asserts is that
 "the sureties conditioned their liabilities to third par-
 "ties who were entitled to liens when no one was en-
 "titled to such right; and since they assumed the lia-
 "bility only to the college for a faithful performance
 "of the contract and to hold it harmless but assumed
 "no real liability to third parties, therefore the un-
 "dertaking should be so construed as to make them
 "assume the liability to such persons. This is mere-
 "ly another way of saying that courts may not only
 "enforce but also create liabilities. The sureties to
 "the bond had the right to contract that it should be
 "exclusively for the benefit of the college and alone
 "to indemnify it. They also have the right to con-
 "tract that it should be for the benefit of only partic-
 "ular third parties and when such specification has
 "been made in words and language free from ambig-
 "uity and which convey a definite meaning there is
 "no occasion for interpretation but the language
 "should be given effect according to its natural and
 "obvious meaning.

"Appellant also strongly relies on the stipula-
 "tions in the bond that the contractors shall abide by
 "and shall perform the covenants and agreements of
 "the contract entered into between them and the col-
 "lege; and 'shall duly and promptly pay and dis-
 "charge all indebtedness that may be incurred' by
 "the contractors 'in carrying out the contract and
 "to complete the same free of all mechanics' liens;'

“and shall perform the covenants and agreements of
 “the contract in time, manner and form as therein
 “specified, especially the clause, ‘shall pay and dis-
 “charge all indebtedness incurred by the contractor
 “in carrying out the said contract,’ from which, it is
 “urged, that the language there used is broad
 “enough to include a promise to pay for material
 “furnished to and used by the contractors in the
 “construction of the building. Considering the
 “clause standing alone, there is some force to the
 “contention. But, as before observed, in construing
 “the terms of a contract, the ruling intention of the
 “parties is to be determined, not from any one or
 “several stipulations in the contract disconnected
 “from all others, but it is to be determined from all
 “the language which the parties have used and from
 “a consideration of the whole contract. When the
 “clause is construed with context, and in connection
 “with what precedes and what follows it, no such
 “meaning as is contended for by appellant can be
 “given it. The payment and discharge of the in-
 “debtedness specified are referable to the contract
 “entered into between the contractors and the col-
 “lege, but therein the contractors did not promise
 “or agree to pay any indebtedness arising from ma-
 “terials or labor furnished them or for materials
 “furnished for or labor performed on the
 “building; nor did they agree to pay any in-
 “debtedness, except such as should be asserted
 “against the college and for which liens could be
 “filed. By the expression, ‘shall pay and discharge
 “all indebtedness incurred in carrying out the con-
 “tract,’ the parties clearly meant the indebtedness of
 “claims which could be asserted against the college
 “and for which liens could be filed. It cannot be

"construed to mean an express covenant to pay ma-
 "terialmen or laborers unconditionally. *Montgom-*
 "ery v. Rief, 15 Utah, 495, 50 Pac. 623. From a
 "consideration of all the provisions of the bond, and
 "in connection with the contract which it was given
 "to secure, it is our opinion that the bond was taken
 "to indemnify and save the agricultural college
 "harmless from claims and liens and those entitled
 "to liens. The parties having thus expressed them-
 "selves unambiguously, we can see no reason why
 "this court should strain after reasons for thwart-
 "ing their obvious purpose in an endeavor to read
 "someone into the bond not intended to be benefited
 "by it. Though a promise had been made to pay
 "for materials, yet if, from the whole bond, such
 "promise was made only for the purpose of saving
 "the agricultural college harmless and to indenmify
 "it against loss or damage, and not for the benefit
 "of parties who might furnish material, and that
 "such was the ruling intention of the parties, then
 "the sureties cannot be made liable to parties who
 "furnished material, for the reason that the ruling
 "intention of the parties must govern. *Parker v.*
 "*Jeffrey*, 26 Or. 186, 37 Pac. 712. In the case of
 "*Electric Appliance Co. v. United States Fidelity*
 "*& G. Co.*, 110 Wis. 434, 53 L. R. A. 609, 85 N.
 "W. 648, the contractors in their contract agreed
 "with a city to deliver the structure free and clear
 "of all claims or liens for labor performed and ma-
 "terials furnished; and that before final payment
 "the contractors should produce receipts for all la-
 "bor performed and materials furnished, and agreed
 "to furnish a bond to the city, not only for the faith-
 "ful performance of the contract, but for the pay-
 "ment of all claims for labor and materials. The

"bond accepted by the city, however, omitted this
 "latter provision, and was conditioned only for the
 "faithful performance of the contract. The statute
 "there giving mechanics' liens did not extend to and
 "could not be enforced against buildings and real
 "estate of municipal corporations held for public
 "use; nor was the city there liable for the claims of
 "laborers or materialmen. In denying the right of
 "materialmen to enforce the security, the court ob-
 "served that 'the fact that the city expressly con-
 "tracted that the bond given should be for the pay-
 "ment of materialmen and laborers, and
 "then accepted a bond without such a condition, is
 "clearly a waiver of that condition of the con-
 "tract, and indicates an intention to aban-
 "don or relinquish its scheme in that re-
 "spect.' These cases but illustrate the princi-
 "ple that the liability of a surety on his bond is en-
 "tirely dependent upon his covenants and agree-
 "ments so construed as not to extend the liability
 "by implication beyond the terms of his contract.
 "In the cases cited by the appellant, where no right
 "of lien was given materialmen and laborers, and
 "where they were permitted to enforce the security,
 "we find express agreements and covenants made
 "on the part of the sureties to pay for material and
 "labor, and the bond given for the benefit of such
 "persons. We find no such intention expressed in
 "the bond, nor in the contract before us."

We refer the court to the case of *Hunt v. King*, 97
 Iowa 88, 66, N. W. 71, where a public building was be-
 ing erected for the county and a surety bond was given
 to insure the performance of the contract free and clear
 of all liens, charges or claims on the part of the sub-

contractors, laborers or materialmen. The court said that a bond to secure the performance of a contract for the construction of a county building, conditioned upon the execution by the contractor of a satisfactory certificate, and that no mechanics' liens or other claims are chargeable to the county, does not make the bondsman liable for any debt of the contractor for materials used in the construction of the building. It said:

“The county has only contracted against payment when there are liens or claims chargeable to it. Would it be contended that the county could avoid payment to King, because material or labor was not paid for, if it conceded that claims therefor were not chargeable to it. The contract could bear no such construction, because of the definite language used. We do not discover a word to indicate the purpose of the county to protect others than itself from loss because of payments made. The provisions are against liens or claims chargeable to it.”

In the case at bar we do not find a syllable to show that the bond executed by Hicks with his surety is executed pursuant to section 6266 of Lord's Oregon Laws, nor any intention, express or implied, that the bond is to secure anyone other than School District No. 1. We submit that the reasoning in the last cited case is very pertinent.

In the case next cited, where a bond, conditioned that the contractor should perform the contract and all the covenants and conditions therein contained and pay and discharge from said premises all liens of materialmen,

laborers or otherwise, which might accrue on account of said building contract, was given to the Board of Education to secure the performance of a contract for the construction of a school house, it was said that there was no breach of said bond, so far as the Board was concerned, where liens could not be filed upon the property, even though the contractor failed to pay for a portion of the labor and material used in its construction.

Spaulding Lumber Co. v. Brown, 171 Ill. 487,
49 N. E. 725.

The principles and the conclusions expressed in the cases herein set out have been discussed and agreed upon in the following cases:

Montgomery v. Reif, 15 Utah, 495, 50 Pac. 623.
Simonson v. Grant, 36 Minn. 439, 31 N. W. 861.
Green Bay Lumber Co. v. Independent School
District, Iowa, on rehearing, a former judgment being reversed, 121 Iowa, 663, 97 N. W.
72.

Editor's note, 9 L. R. A. (new series) 889.

We submit to the court that, considering the language of the contract between the Hicks Company and School District No. 1, "If at any time there shall be "evidence of any lien or claim for which, if established, "the owner of the said premises might become liable," and further considering the bond given to secure the performance of said contract, and the said condition, "If the said contractor shall well and faithfully perform "all covenants, conditions and provisions in said contract, plans and specifications, and shall pay all claims

“or liens for labor, work and material on account of all “sub-contractors, materialmen, laborers and mechanics “furnishing labor or material,” and considering the language of the contract between the Hicks Company and the Sullivan Company wherein “the sub-contractor “agrees to save and keep the said building and premises “free and clear of any and all mechanics’ liens for work “or labor done or material furnished in the doing of the “work specified herein,” the clear intent of School District No. 1, the owner of the property, was to save itself free and harmless from all charges, claims or liens, and that the intent of the Hicks Company, as between it and its sub-contractor Sullivan, was to save the Hicks Company free and clear of all charges, claims or liens on the part of any work; and considering the obligation of the bond that it was to save harmless School District No. 1 from these various things, and then further considering the fact that Hicks could not offset or counterclaim as against Sullivan’s assignee, Ladd & Tilton Bank, for the amount of these claims unless they are directly chargeable under his bond, the reception of all evidence based on such claims and the liability therefor of the Hicks Company was erroneous, and, as the consideration thereof was the foundation of the court’s opinion and judgment, that the decision of the trial court ought to be reversed.

Section 6266 of Lord’s Oregon Laws has been construed by the Supreme Court of the State of Oregon to this effect: That the bond, being statutory, should be strictly construed, and sureties thereon have a right

to demand that the claimant shall bring himself fairly within its terms.

School District No. 6 v. Smith, 63 Or. 586, decided November, 1912.

We submit to the court that if this action had been brought against the surety company, the defense we are making would have been available to it; and whatever grounds of defense the surety company may have as to its liability on the bond at the instance of a suit by School District No. 1 or the Hicks Company, the same defense is pertinent to Ladd & Tilton Bank; for if the surety is not liable, then the Hicks Company is not authorized to pay these other claims and cannot assert the same as an offset or counterclaim to Ladd & Tilton's demand.

Inasmuch as the assignments of error now being discussed comprehend several phases, we desire to submit to the court our argument based upon another ground, demonstrating why the judgment of the lower court was erroneous and ought to be reversed.

Objection was made by the plaintiff in error to the admission of all testimony on the part of the defendant relative to unpaid bills incurred by the Sullivan Company in connection with its work on the new Lincoln High School. It is to be noted by the defendant's answer, paragraph XII. (transcript of record, page 15), that the Hicks Company paid out \$214.99 by virtue of

a writ of garnishment served on it in a suit entitled Roebblings Sons Company v. Sullivan Fireproof Partition Co. It is to be further noted that by paragraphs XIII, XIV and XV of the answer (transcript of record, pages 16 and 17) defendant alleges that various laborers and materialmen furnished labor and material to the Sullivan Fireproof Partition Co. in the course of its work done under its sub-contract to the extent of \$4,496.61, and that said laborers and materialmen are claiming from the Hicks Company the amount thereof, and the defendant is liable and will be compelled to pay said sum. It will be noted from the allegations of the answer above referred to that no part of said sum of \$4,496.61 claimed by the laborers and materialmen supplying labor and material to the sub-contractor Sullivan *has been paid* by the Hicks Company. On the contrary, it is alleged that it *has not been paid*, but that *the Hicks Company will be liable for the said amount in the future*. And the testimony adduced at the time of the trial on behalf of the defendant (transcript of record, pages 111 to 122 inclusive) conforms to the allegations of the answer in so far as it shows that the sums comprising this \$4,496.61 have not been paid by the Sullivan Company or the Hicks Company, and therefore the defendant concludes, without proof or testimony thereto, *that it will be in the future* liable for the full amount of each of said claims. Objection was made by the plaintiff to the reception of all such testimony, which was overruled by the court (transcript of record, p. 48 and p. 62), the essence of the objection being that the claims to which the testimony referred were uncertain and unliquidated;

and, further, that the same had been improperly pleaded; and, further, that the same did not constitute proper items of setoff as against the plaintiffs' demand.

Counsel for plaintiff in error contended at the time of the trial, and now contends, that the Hicks Company should have reduced all the claims for labor and materials set forth in its answer to a definite and fixed amount, and that payment thereof should have been made by the Hicks Company, before the same could be pleaded as an offset to the plaintiff's demands. The argument upon this point embraces two theories, the first being that the Hicks Company, by the stipulation in its contract and the bond executed, was to be indemnified against *damages* and was not to be indemnified against *liability*, and that therefore the Hicks Company had no defense on account of such claims until it had been damaged by the payment of moneys to its materialmen and laborers, and that it was not damaged by the mere assertion of the claims, and that the mere assertion thereof was not sufficient to support a counterclaim.

The other theory of the objection was and is that the greater portion of the claims of the laborers and materialmen furnishing labor and material to Sullivan, the sub-contractor, was not for work, labor and material furnished to the Sullivan Company in connection with its contract on the new Lincoln High School, but was for work, labor and material partially furnished to other buildings and therefore not a proper counterclaim on the part of Hicks.

The first theory of the objection will be discussed at this time. The second is more logically comprehended in the argument which follows later.

To make relevant our argument that Hicks was to be indemnified against damages and not against liability we refer to the terms of the contract.

Paragraph 3 of Article IX. of the contract entered into between the Hicks Company and School District No. 1 (transcript of record, page 190) is as follows:

“If at any time there shall be evidence of any
 “lien for which, if established, the owner of the said
 “premises might become liable, and which is charge-
 “able to the contractor, the owner shall have the
 “right to retain out of any payment then due or
 “thereafter to become due an amount sufficient to
 “completely indemnify _____ against such
 “lien or claim. Should there prove to be any such
 “claim after all payments are made, the contractors
 “shall refund to the owner all moneys that the latter
 “may be compelled to pay in discharging any lien
 “on said premises made obligatory in consequence of
 “the contractor default.”

Paragraph X. of the sub-contract entered into between the Hicks Company and the Sullivan Company (transcript of record, page 175) is as follows:

“The sub-contractor agrees to save and keep the
 “said building and premises free and clear of any
 “and all mechanics’ liens for work or labor done or
 “materials furnished in the doing of the work speci-
 “fied herein, and in this connection the sub-con-
 “tractor agrees to pay promptly as they become due
 “all sums incurred for such work or labor done or

“materials furnished, and in case of any default on
 “the part of the sub-contractor, the contractor shall
 “have the right to pay said sums, together with any
 “additional sums the payment of which is necessi-
 “tated by such default of the sub-contractor, either
 “for costs, attorney’s fees or otherwise, and all sums
 “so paid by the contractor shall be repaid by the sub-
 “contractor, and the contractor may withhold any
 “money due the sub-contractor until such indebted-
 “ness is repaid, and the contractor may declare this
 “contract rescinded, resume possession of the prem-
 “ises, complete the work and charge the same against
 “the sub-contractor, all in the manner and with the
 “same rights as are provided in subdivision V here-
 “of.”

We desire to call the attention of the court to the pertinent language of the paragraph just quoted, which is, “the sub-contractor agrees to pay promptly as they
 “become due all sums incurred for such work or labor
 “done or materials furnished, and in case of any default
 “on the part of the sub-contractor the contractor *shall*
 “*have the right to pay said sums, together with any addi-*
 “*tional sums the payment of which is necessitated by*
 “*such default of the sub-contractor, either for costs, at-*
 “*torney’s fees or otherwise, and all sums so paid by the*
 “*contractor shall be repaid by the sub-contractor, and*
 “*the contractor may withhold any money due the sub-*
 “*contractor until such indebtedness is repaid.*”

The very clear unambiguous meaning of this clause of the contract is that if the sub-contractor (the Sullivan Company) *does not pay the claims* of laborers, the contractor (the Hicks Company) might do so and offset

such claims against all moneys which may be due from the contractor to such sub-contractor, the very material point being that the contractor (Hicks Company) did not reserve the right to offset against the moneys due the Sullivan Co. the claims for laborers and materialmen, which might be filed, but only those which the Hicks Company was compelled to pay, and that the Hicks Company is not damaged until it has made such payment. Our contention is that the reserved right in the Hicks Company is the right to offset as *against damages alone* and not as *against liability*, and that therefore the reception of any evidence tending to show a liability, or a claim, which has not been liquidated or paid, was clearly incompetent; and that as the reception of such evidence formed the basis of the trial court's judgment, manifest error was committed in receiving the same.

In support of our contention we refer the court to the case of *Henry v. Hand*, 36 Ore. 492, in which the opinion of the court was rendered by Chief Justice Wolverton. We quote from his opinion, beginning at page 495:

"The questions involved in this controversy arise
 "entirely upon the court's instructions to the jury.
 "The defendant's theory is that the simple filing of a
 "claim did not constitute a lien, within the purview
 "of the bond, and did not afford legal justification
 "on the part of the owner as against the sureties, for
 "withholding the last payment after it became due.
 "The question as to when the payment became due,
 "under the evidence, was left to the jury; but they
 "were instructed that when due it was the duty of

“the owner to pay, notwithstanding claims of lien
 “had been filed, provided suits had not been insti-
 “tuted for their foreclosure, and, even if suits had
 “been commenced which the payment would have
 “stopped, it was his duty to make it then; that he
 “could not hold the money and hold the sureties too,
 “contrary to the terms of the contract. On the part
 “of the plaintiff, it is contended that the bond in the
 “suit is, in effect, one of indemnity against liability,
 “and that a breach thereof by reason of a failure to
 “keep the building free from mechanics’ or other
 “materialmen’s liens for thirty-five days entitled the
 “owner to recover the amount of such liens against
 “the sureties, whether he had discharged them or
 “not; while, on the other hand, it is claimed that the
 “liability for damages does not arise in favor of the
 “owner until he has been actually damnified, or un-
 “til he has been compelled to, or has paid or dis-
 “charged such liens; that the bond is, in effect, one
 “of indemnity against damages, rather than against
 “liability. And in this view we concur. “There is a
 “marked analogy between this undertaking and a
 “covenant that premises are free from incum-
 “brances, or that the purchaser shall enjoy them free
 “from incumbrances. This sort of covenant is dis-
 “tinguished from one to discharge incumbrances;
 “the distinction being that in the former instance no
 “recovery can be had unless some damage is shown
 “to have been inflicted, except it be of a nominal
 “character. But where the covenant is to do a par-
 “ticular thing in exoneration of the covenantee, or to
 “indemnify him against liability, the right of action
 “is complete as soon as there is a failure to perform,
 “or the liability has been incurred: Rawle, Cov.
 “Title, p. 93.

“Haas v. Dudley, 30 Ore. 355 (48 Pac. 168),
 “where there was an agreement to assume and pay
 “an incumbrance and to save the grantor harmless,
 “it is a good illustration of an undertaking to do a
 “particular thing, and that the liability for the pay-
 “ment of the incumbrance became fixed when it fell
 “due, whether it had been discharged by the grantor
 “or not. So with an indemnity against liability. When
 “the liability arises, damages are recoverable, to the
 “extent of the liability, whether it has been dis-
 “charged by the obligee or not. But ‘the covenant
 “against incumbrances * * * is yet,’ says
 “Rawle, ‘as respects the measure of damages, treat-
 “ed purely as a covenant of indemnity; and it is well
 “settled that if the incumbrance has inflicted no ac-
 “tual injury upon the plaintiff, and he has paid
 “nothing toward removing or extinguishing it, he
 “can obtain but nominal damages as it is considered
 “that he shall not be allowed to recover a certain
 “compensation for running the risk of an uncertain
 “injury:’ Rawle, Cove. Title p. 288. See also De-
 “LaVergne v. Norris, 7 Johns 358 (5th Am. Dec.
 “281); 8 Am. & Eng. Enc. Law (2nd Edition) p.
 “181. So it has been held in this state that ‘a cove-
 “nant against incumbrances is broken so as to entitle
 “the grantee to at least nominal damages, if at its
 “date there was an outstanding incumbrance on the
 “property not excepted from the operation of the
 “covenant; and, where the grantee pays off an in-
 “cumbrance not excepted from the covenant, the
 “amount so paid may be recovered from the grantor,
 “less whatever the grantee may have agreed to pay
 “for that purpose:’ Corbett v. Wrenn, 25 Ore. 305
 “(35 Pac. 658). The undertaking in question is to
 “keep the structure free from all mechanics’, ma-

“terialmen’s or other liens. It is of the same nature
 “as a covenant that the purchaser shall enjoy the
 “premises free from incumbrances, and of like char-
 “acter as the undertaking in *Cochran v. Selling*, 36
 “*Ore.* 333 (59 *Pac.* 329), to ‘save harmless against
 “the payment of any and all (existing) claims and
 “demands, of whatever kind or nature,’ which was
 “held to constitute an indemnity against damages,
 “and not against liability. It is apparent, there-
 “fore, that the owner was not entitled to recover, as
 “against the obligors in the bond, the full amount
 “of the liens claimed as soon as they became estab-
 “lished under the law as liens upon the building and
 “that it was necessary for him to pay off and dis-
 “charge the same before he could recover more than
 “nominal damages for the breach.”

Also see 27 *Cyc.* 309, where it is said:

“A bond to protect against liens is usually con-
 “sidered to contemplate indemnity against damage
 “rather than against liability, and hence the owner
 “is not entitled to recover as against the obligors in
 “the bond the full amount of the liens claimed as
 “soon as they become established under the law as
 “liens upon the building, but it is necessary for him
 “to pay off and discharge the liens before he can
 “recover more than nominal damages for a breach
 “of the bond.”

See also: :

Carson Opera House v. Miller, 16 *Nev.* 327.

Church v. Conlin, 11 *Pa. Superior Court*, 413.

8 *Am. & Eng. Enc. of Law*, 2nd Ed., p. 180.

As further substantiating the point being urged, we refer the court to the bond executed by the Lewis A. Hicks Company as principal, with the Pacific Coast Casualty Co. as surety, to School District No. 1 (transcript of record, p. 11), wherein it is provided that if the contractor shall pay all claims or liens for labor, work and material on account of all sub-contractors, materialmen, etc., then the obligation shall be void. We submit that this is further confirmatory of our view that the covenant of the contract between Hicks and School District No. 1, and the covenant in the sub-contract between Sullivan and Hicks, and the provision in the bond referred to, is a covenant *against damages*, and is not a covenant *against liability*, and that before such claim can be asserted, either as against the Sullivan Company or its assignee, Ladd & Tilton Bank, damage must have been incurred by Hicks Company; and that damage can only have been incurred by the *payment* of a proper claim, and not merely by the *filing* of such a claim. We submit that the covenants in the contracts and bond above referred to are covenants against damage and not against liability, and that therefore any evidence offered or received in reference to claims not paid or liquidated by the Hicks Company was not proper and could not be considered a proper subject of offset as against the Sullivan Company or its assignee, Ladd & Tilton Bank, and that the trial court committed error in receiving the same.

The assignments of error under discussion contain further reversible error based on the following facts and law.

Conceding, for the purposes of argument under this sub-head, that the bond executed by Hicks as principal and the Pacific Coast Casualty Company as surety to School District No. 1 was executed pursuant to section 6266 of L. O. L., and conceding that the defendant offered testimony which would prove the same, we desire to submit that the reception of any evidence relative to the unpaid claims of laborers and materialmen furnishing labor and material to the sub-contractor Sullivan was incompetent, irrelevant and immaterial, and therefore error.

The law of Oregon is that a public building is not subject to mechanics' or materialmen's liens. There is no statutory enactment to this effect, but the Supreme Court of this state has announced the rule on grounds of settled public policy. We refer to the cases of Portland Lumbering & Manufacturing Co. v. School District No. 1, 13 Ore. 283, and Benbow v. The James Johns, 56 Ore. 554, where this rule is announced and affirmed.

The legislative assembly of Oregon, in 1903, recognized that mechanics' liens could not be filed against public buildings, and in its desire to make a substitute therefor, for the benefit of laborers and materialmen, enacted what is known and has been referred to in this brief as section 6266 of L. O. L., the same being as follows:

"Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or

“school district within said state, for the construction of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts; and any person or persons making application therefor, and furnishing affidavit to the proper officer of such state, county, municipality or school district under the direction of whom said work is being or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for the same has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor or materials shall have a right of action, and shall be authorized to bring suit in the name of the State of Oregon, or any county, municipality or school district within such state for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution.”

So far as we are advised, the foundation of such legislation was laid by the United States government, the rule of law being that buildings belonging to the federal government were not lienable by laborers or materialmen. Thereupon, in 1894, Congress enacted a statute referred to as the Act of August 13, 1894, c. 280, 28 Stat. 278, U. S. Compiled Statutes 1901, p. 2523, now

amended by Act. of February 24, 1905, c. 778, 33 Stat. 811, U. S. Compiled Statutes 1901, p. 709. Upon this federal enactment is based the Oregon law, which is similar in the language used.

The basis of the argument which we desire to submit to the court upon this point is primarily founded upon the following contention: Laborers and materialmen not having a lien against a public building for labor or material furnished therefor, in lieu of the building against which mechanics' liens can be filed, Oregon has provided that a surety bond shall be given by the subcontractor and that the rights and remedies of laborers shall be had against such bond in lieu of all rights and remedies against a lienable building, and, further, that the rights and claims of laborers can only be asserted against a bond which has taken the place of a lienable building in cases where those rights are lienable rights under the general mechanics' and materialmen's lien laws of the state. Inasmuch as the Congressional enactment has received the construction of the Supreme Court of the United States, we will briefly advert thereto.

In the case of *United States for the Use of Hill v. American Surety Company*, 26 Sup. Ct. Rep. (U. S.) 163, Mr. Justice Day said (at page 170):

“As against the United States, no lien can be
 “provided upon its public buildings or grounds, and
 “it was the purpose of this act TO SUBSTITUTE
 “THE OBLIGATION OF A BOND FOR
 “THE SECURITY WHICH MIGHT OTH-
 “ERWISE BE OBTAINED BY ATTACH-
 “ING A LIEN TO THE PROPERTY OF

“AN INDIVIDUAL. The purpose of the law
 “is, as its title declares: ‘For the protection of per-
 “sons furnishing materials and labor for the con-
 “struction of public works.’ If literally construed,
 “the obligation of the bond might be limited to se-
 “cure only persons supplying labor or materials di-
 “rectly to the contractor, for which he would be
 “personally liable. But we must not overlook, in
 “construing this obligation, the manifest purpose
 “of the statute to require that **MATERIAL AND**
 “**LABOR ACTUALLY CONTRIBUTED TO**
 “**THE CONSTRUCTION OF THE PUBLIC**
 “**BUILDING SHALL BE PAID FOR, AND**
 “**TO PROVIDE A SECURITY TO THAT**
 “**END.**”

In referring to this Congressional enactment, the Supreme Court of the United States, in the case of *U. S. Fidelity & Guaranty Co. v. United States*, 24 Sup. Ct. Rep. 142, through Mr. Justice Brown, said:

“Inasmuch as neither the contractor nor his sub-
 “contractor can secure themselves by a mechanic’s
 “lien upon the proposed building, the government,
 “solely for the protection of the latter, requires a
 “covenant for the prompt payment of his claims and
 “the same security that it requires for the perform-
 “ance of the principal contract. In this covenant
 “the surety guarantees nothing to the principal ob-
 “ligee,—the government,—though the latter per-
 “mits an action upon the bond for the benefit of the
 “sub-contractors. The covenant is made solely for
 “their benefit. The guarantor is ignorant of the par-
 “ties with whom his principal may contract, the
 “amount, the nature and the value of the materials

“required as well as the time when the payment for
“them will become due.”

The same construction was announced and affirmed in the case of *Smith v. Mosier*, 169 Fed. 430.

Also in the case of *United States v. Ansonia Brass & Copper Co.*, 31 Sup. Ct. Rep. 49.

We submit that the State of Oregon did not desire any of its citizens or artisans to be deprived of a right because of doing work for the state on public buildings, which they would otherwise have for work performed or materials furnished for buildings privately owned and for which they could make the owner of the premises responsible for the default of his agent or subcontractor; but by virtue of the state's announcement, as a portion of its public policy, that its public buildings could not be liened, the state enacted what is known as section 6266 of L. O. L., which, so far as we are able to ascertain, is for the purpose of giving to laborers and materialmen upon public buildings the same degree of protection as was given to them as against private buildings. In other words, instead of the building the law provided for a bond which took the place of the building, and against which mechanics' liens could be filed whenever the laborer or the materialman had a lienable item. But if the construction as contended for by the attorney for the defendant is given to section 6266 of L. O. L., then all those who perform labor or furnish material to a public building are in a more advantageous position and can reap greater benefits than can the same man who furnishes labor or material to a structure pri-

vately owned. We desire to submit to the court that section 6266 L. O. L. and the bond authorized to be given thereunder, take the place of a privately owned building for the protection of laborers and materialmen who may have claims on account thereof. If our premises are correct, then the laborers and materialmen who furnished work and labor to the sub-contractor Sullivan could have a claim against the bond executed by Hicks and his surety only when such laborer or materialman had a claim for which the laws of Oregon would authorize him to file a mechanic's lien against a structure privately owned; and, further, that if a laborer or a materialman had a claim in the case at bar which could not be the subject of a mechanic's lien if the structure being erected by Hicks was a privately owned building, then such claim could not be successfully asserted against the bond and its surety. The rule of law adopted in Oregon, for which sustaining authorities will be cited later, is that the mechanics' lien laws of this state are in derogation of the common law and should be strictly construed, and that where a lien is filed which contains claims for lienable and non-lienable items lumped together, the whole of the lien must fall and there is no enforceable remedy of the lienor against the premises, even though his claim, if properly segregated, contains proper lienable items. The lien laws of the State of Oregon are set forth in section 7416 of Lord's Oregon Laws, et seq.

If we are correct in our premises, let us apply the general lien law of the State of Oregon to the various items comprising the four thousand four hundred and ninety-six and 61-100 dollars which the defendant sets

forth as a counterclaim to plaintiff's cause of action, because defendant contends that it has to pay these claims irrespective of merits by virtue of the bond; and we contend that if the bond takes the place of the building for the purpose of the liens, then liens can only be successfully asserted as against the bond when the claims are actual lienable items under the general laws of the state.

We refer to the testimony as it was given in the bill of exceptions (transcript of record, beginning at page 47 and ending on page 61); also to the same testimony as set forth in the evidence (transcript of record, beginning at page 111 and ending on page 129); and also to the same testimony as set forth in the assignments of error (transcript of record, beginning at page 204 and ending at page 217).

The first claim is that of the Acme Cement Plaster Company (transcript of record, page 47). Witness, A. C. Sullivan. Questions by Mr. Thomas:

"Q. I will call your attention to the claim of the "Acme Cement Plaster Company. Will you look at the "book and see if there is anything there in connection "with the Acme Cement Plaster Company?

"A. Yes, sir, the books shows we are owing them "\$836.55.

"Q. What was that for?

"A. It was for plaster.

"Q. Where was the plaster used?

"A. It was used in making blocks.

"Q. And those blocks were used in the Lincoln "High School?

"A. Lincoln High School building.

"Q. Has this sum of \$836.55 been paid?

"A. No, sir

"Q. That is still due the Acme Cement Plaster Company?

"A. Yes, sir.

Cross examination by Mr. Hunt (transcript of record, page 60.)

"Q. Do you know whether or not any material "was furnished by these parties that went into blocks, "which blocks were placed in any other buildings and "other places, other than the Lincoln High School?

"A. Yes, we had a surplus number of blocks from "the school that were taken away and used on the Smith "Hotel Building.

"Q. Where is that?

"A. I think called it Sixth and Main, if I remember right.

"Q. That is in the City of Portland?

"A. City of Portland, yes, sir.

"Q. About how many was that, do you know?

"A. Probably about ten thousand feet."

And further (transcript of record, page 158): Witness A. C. Sullivan. Questions by Mr. Hunt.

"Q. When you were manufacturing blocks in the "City of Portland at the time mentioned in the complaint "and referred to in the evidence, did you have any other "contracts for the furnishing of blocks for other build- "ings?

"A. While we were working on the school?

"Q. Yes.

"A. Yes, we had one with the Smith Hotel Build- "ing.

"Q. Any other?

"A. Well, we were furnishing some small orders. "Just—not under contracts but under orders given to us.

"Q. Will you please state whether at the time you "were manufacturing blocks for the Lincoln High "School, you were manufacturing blocks from the same "material for other jobs.

"A. Well, sir, when we got this Smith Hotel Build- "ing, we figured on using what three-inch blocks were "being made at the plant at the High School, to put into "the Smith Hotel. It was an outlet that was provided "for these three inch blocks, which had to be made in "making the six inch blocks.

"Q. Was it your intention at the time you were "manufacturing blocks for the Lincoln High School to "manufacture other blocks to keep in stock as future re- "serve?

"A. * * * * Well, at the time they were "made, they were not intended particularly for stock; "we intended to sell them if we could. It happens that "we still have some of them in stock.

"Q. Did you manufacture more blocks at this time "than you knew would be necessary to put in the Lincoln "High School?

"A. Well, we made more of those three inch blocks "than we knew would be used. We didn't make any more "other sizes than supposed to go in the school."

The contention of the plaintiff in error upon the claim of the Atlas Cement Plaster Company is that under the general lien laws of the State of Oregon the Acme Cement Plaster Company would not have a lien against the Lincoln High School Building if the same were lienable under the general laws of the State of Oregon.

The Supreme Court has announced that the test of lienability is use, and there could not be a lien unless the material had benefited the owner by being consumed in the construction of the building; and where materials are furnished to the contractor and only a part of them are used in the construction of the building, the rest being transferred to other places and uses, a lien can be enforced only for the part that benefits the owner of the building.

Fitch v. Howitt, 32 Ore. 396, 52 Pac. 192.

Harrisburg Lumber Co. v. Washburn, 29 Ore. 164, 44 Pac. 390.

Therefore, based on the foregoing rule of law adopted in this state, the Acme Cement Plaster Company could only file or claim a lien for the material which it supplied to Sullivan and which went only into the building against which the lien is being asserted. As the corollary of this rule, we refer the court to another, which is that where the notice of the lien states a lump sum and part of the material furnished was used for the building and part not, no lien will attach to the property.

Dalles Lumber Co. v. Woolen Mfg. Co., 3 Ore. 527.

Kezartee v. Marks, 15 Ore. 529, 16 Pac. 407.

Williams v. Toledo Coal Co., 25 Ore. 426, 36 Pac. 159.

Allen v. Elwert, 29 Ore. 444, 44 Pac. 824.

Hughes v. Lansing, 34 Ore. 124, 55 Pac. 95.

We submit that if the Acme Cement Plaster Company cannot segregate the material furnished by it to

the sub-contractor Sullivan and which went into the Lincoln High School building, from that which entered into the Smith Hotel and other buildings and to create a reserve stock for the sub-contractor Sullivan, then its claim must fall and it would have no right to a lien and no action against the bond, and therefore Hicks would not become liable on account thereof, and the claim of the Acme Cement Plaster Company cannot be asserted by Hicks as a counterclaim to the action brought by Ladd & Tilton Bank, and the Acme Cement Plaster Company is relegated to its claim and cause of action against the Sullivan Company.

Continuing the testimony in reference to these items, we refer to the transcript of record, page 113. Witness, A. C. Sullivan. Questions by Mr. Thomas:

“Q. Now will you refer to the Atlas Mixed Mortar Company.

“A. We are owing them \$121.30.

“Q. What for?

“A. For sand and hauling.

“Q. In what connection?

“A. The Lincoln High School.

“Q. Has that been paid?

“A. No, sir.”

Cross examination by Mr. Hunt (transcript of record, page 122):

“Q. And what was the Atlas Mixed Mortar Company?

“A. That was sand and hauling.

“Q. Can you segregate the two items?

“A. Well, hardly, I should say about half and half.

"Q. About half and half?

"A. That is a guess, though."

We wish to refer the court to the testimony herein-above quoted under the claim of the Acme Cement Plaster Company, wherein the testimony of Sullivan shows that the materials furnished by all of these materialmen not only entered into the manufacture of blocks for the Lincoln High School, but also into the manufacture of blocks for the Smith Hotel and other contract jobs, and for the purpose of making a supply on hand in their yard. And under the rules of our Supreme Court, as announced above, relating to mechanics' liens, the claim just referred to is not a properly lienable item.

Continuing the testimony (transcript of record, page 114): Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I will call your attention to the name of the "Portland Quarry Company.

"A. We are owing them \$134.00 for hauling "away rubbish from the Lincoln High School.

"Q. Hauling rubbish away from the Lincoln High "School?

"A. Yes, sir.

"Q. In connection with your contract there?

"A. Yes, sir.

"Q. Has that been paid?

"A. No, sir."

We wish to submit to the court that the hauling away of rubbish is not a lienable item under the lien laws of the State of Oregon, and therefore is not a proper claim against the bond in the case at bar. The

exact language of the law, Section 7416, Lord's Oregon Laws, is: "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman, and other person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration," etc. As we have before stated, the mechanics' lien law must be strictly construed, and the exact language of the statute is, "for hauling material to be used in the construction of a building," and under this language we do not believe that one who hauls the refuse or rubbish away is one who is hauling material to be used in the construction of the building; and therefore the expense thereof is a non-lienable expense.

Continuing the testimony (transcript of record, page 114): Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the Columbia Contract Company.

"A. We are owing them \$114.08.

"Q. For what?

"A. For sand furnished to the Lincoln High School.

"Q. Has that been paid?

"A. No, sir."

The same comments made hereinbefore on the claim of the Acme Cement Plaster Company and the Atlas Mixed Mortar Company apply to the above item, as the sand, being one of the elements composing the partition blocks, did not all enter into the new Lincoln High School; and therefore this is a non-lienable item.

Continuing the testimony (transcript of record, page 114): Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I will call your attention to the claim of the "Columbia Hardware Company.

"A. We owe them \$30.22, as near as I was able "to figure it out on the Lincoln High School. We "bought hardware from different firms, and a part was "delivered to our place on the east side, but as near as I "could segregate it, we owe them \$30.22 on the High "School.

"Q. Do you happen to know the full amount you "owe the Columbia Hardware Company?

"A. We owe them in addition to the \$30.22—we "owe them \$72.33.

"Q. But that is not connected with these?

"A. No connection with the school.

"Q. Has that \$30.22 been paid?

"A. No, sir.

Cross examination by Mr. Hunt (transcript of record, page 123.)

"Q. And the Columbia Hardware Company?

"A. Why for various forms of hardware we "bought from them. Used tools of various kinds.

"Q. Tools?

"A. —Tools, and—oh, parts of machinery and "parts of boilers and such as that.

"Q. That was a part of your permanent equipment "and plant, was it not?

"A. Part of it was, yes.

"Q. Did any part of that enter into the construction "of the building?

"A. No, the tools were only used in carrying out "the work of construction, and the parts of the boilers

“were used in the boilers in the drying of material.

“Q. Who purchased from the Columbia Hardware Company?

“A. * * * There was a foreman.

“Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

“A. Yes, sir.”

We wish to submit to the court that clearly the above item of the Columbia Hardware Company could not properly be construed to be a lienable claim in any event, under the testimony of the witness, and we submit that this is the only testimony given in regard to it. The items of expense were incurred by the Sullivan Company for acquiring new equipment or repairing the old, and were a part of their permanent plant; and under the lien law of the state no lien can be filed therefor, and, we clearly believe, no claim can be asserted therefor against the bond given by Hicks, for the Columbia Hardware Company did not furnish labor or material for the job and the tools, etc., did not enter into the construction of the building.

Upon this point the Supreme Court of Oregon has held that no lien can be claimed against a building for the use of tools and appliances used in moving or raising it or for transporting them to and from the building, under a statute giving a lien for materials to be used in the repair of the building.

See *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 824.

See also *Jones on Liens*, sec. 1337, which is as follows:

“The statute does not give a lien for machinery
 “furnished for the manufacture of materials used in
 “a building or other structure. Thus, if one con-
 “tracts for building a bridge, and machinery for
 “crushing stone to be used for the mason work, and
 “also appliances to carry the manufactured stone to
 “the place where it is to be used, be supplied to him,
 “there can be no lien for such machinery or ap-
 “pliances. ‘When the law says the material-man
 “shall have a lien for all materials furnished for, or
 “used in and about, the construction of bridges, it
 “means such materials as ordinarily enter into or are
 “used in the construction of bridges, and which are
 “fairly within the express or implied terms of the
 “contract between the owner and contractor. It does
 “not mean the machinery that may be used for the
 “manufacture of the materials themselves. You
 “might just as well say that the mill by which the
 “lumber is sawed, or the tools used by the mechanic
 “in building a house, are materials furnished in the
 “construction of the house, as to say that the ma-
 “chinery used in the manufacture of the artificial
 “stone is to be considered as part of the materials
 “used in the construction of the masonry work of
 “the defendant’s bridges. The machinery thus used
 “is the plant of the contractor, and can in no sense
 “be said to be materials furnished or used in build-
 “ing the bridges.’ ”

Taking up the next item (transcript of record, page
 115.) Witness, A. C. Sullivan. Questions by Mr.
 Thomas.

“Q. I call your attention to the claim of the East
 “Side Transfer Company.

“A. We owe them \$75.65.

"Q. What is that for?

"A. For hauling.

"Q. Hauling of what?

"A. Hauling blocks.

"Q. To the Lincoln High School Building?

"A. To the Lincoln High School Building.

"Q. Has that been paid?

"A. No, sir."

Counsel for plaintiff in error contends that this one item would be a lienable item under the general laws of the state, section 7416, if asserted as a defense and counterclaim against the action of this plaintiff, provided the same had been paid, which the evidence shows it had not.

Continuing the testimony (transcript of record, page 115). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I will call your attention to the claim of E. Hippeley.

"A. That is still owing, \$32.35.

"Q. What was that for?

"A. That was for the rent of motors and some repair work, some wiring.

"Q. In the Lincoln High School Building.

"A. In the Lincoln High School, yes, sir, incidental to this contract.

"Q. Incidental to this contract. Has that been paid?

"A. No, sir."

Cross examination by Mr. Hunt (transcript of record, page 123) :

"Q. Now, you spoke of E. Hippeley, \$32.35, rent
"of a motor. What was that motor used for?

"A. It was used in driving the mixer; we had a big
"tub mixer with which we mixed up the materials used
"in making the blocks. This motor was used in driving
"the mixer.

"Q. You rented a motor from him?

"A. Yes, sir."

We cannot conceive how counsel for the defendant in error or the court can find that such a claim as Hippeley's can be a lienable claim or a claim against the surety bond. Hippeley rented a motor which was used to drive the machinery incidental to the manufacture of the material which was furnished by the sub-contractor to the Lincoln High School; also incidental to the manufacture of material which entered into the Smith Hotel building and other contracts; and to prepare a stock to be kept on hand. Can it be said that the motor was material supplied and used in the construction of the Lincoln High School? We submit that, under the law hereinbefore set forth, this is clearly a non-lienable item, and clearly an item not chargeable against the surety bond; hence the court committed error in allowing the same as a counterclaim against the cause of action asserted by the plaintiff.

Continuing the testimony (transcript of record, page 115). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of the Northwest Door Co.

"A. We are owing them \$51.05.

"Q. What was that for?

"A. For some wood parts for our machinery as used at the Lincoln High School.

"Q. What was that for? Just explain so we can understand.

"A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

"Q. These blocks are hollow; is that the idea?

"A. They were hollow and these wood cores were used for making the hollow part; after these blocks are molded in a machine, they are taken out and the wood cores were knocked out.

"Q. Those are necessary things in the construction of these blocks?

"A. Yes, sir.

"Q. Has that been paid for?

"A. No, sir."

Cross examination by Mr. Hunt (transcript of record, page 124) :

"Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

"A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

"Q. That was a part of the manufacture of the block, was it not?

"A. Yes, a part of the process of making the block."

Can it be said that wood cores which were used in the manufacture of blocks is the furnishing of material which entered into the construction of the new Lincoln High School? We submit that this is not so, and that under the general lien laws of the state of Oregon no lien can be had by the Northwest Door Company therefor. Neither under the terms of the contract between School District No. 1 and Hicks, nor the sub-contract between the Hicks Company and Sullivan, nor the terms of the surety bond, can this item be claimed as allowable. It was material furnished directly to the Sullivan Fireproof Partition Co. on its own credit, and was not the furnishing of material that is within the letter or the spirit of the lien law or of the contract at bar or the surety bond.

Continuing the testimony (transcript of record, page 116). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of the Oregon Transfer Company?

"A. We are owing them \$72.75.

"Q. What was that for?

"A. For hauling at the Lincoln High School.

"Q. Has that been paid?

"A. No, sir.

This is probably a proper lienable item which could be asserted as a counterclaim, if paid.

Continuing the testimony (transcript of record, page 116). Witness, A. C. Sullivan. Questions by Mr. Thomas,

"Q. I call your attention to the claim of the Portland Machinery Company.

"A. We are owing them \$47.85. That is for—I "think it was a fan and some dry kiln trucks used in the "operation of drying the blocks.

"Q. Has that been paid for?

"A. No, sir.

Cross examination by Mr. Hunt (transcript of record, page 124) :

"Q. The Portland Machinery Company, I believe "you said, was for dry kiln trucks.

"A. Dry kiln trucks, and I think for a fan, if I "remember right."

"Q. These trucks, just common trucks to put stuff "on to carry around?

"A. They call it a dry kiln truck; it is used as a "part of a car that goes into the dry kiln to carry blocks.

"Q. And the fan, what is that?

"A. I am not so certain whether their bill included "that fan, or whether or not we paid for it. We had a "fan and bought it from them. I can't recall whether "or not it was paid for.

"Q. Then if this bill of \$47.85 does not include "the fan, it is all for trucks?

"A. Yes, sir; I think that is all we bought from "them.

"Q. Where are those trucks now?

"A. They are over here in a basement where part "of this machinery is.

"Q. Part of your plant—part of your equipment, "are they?

"A. They are now, yes.

"Q. They were then?

"A. They were used as part of the equipment, yes."

Under the law of the State of Oregon previously set forth herein, we submit that the claim for the payment of these trucks is not a lienable item and is not such an item as the surety company or the Hicks Company would be obligated to pay, and that therefore it did not constitute a proper item of counterclaim against the cause of action of the plaintiff. It was part of the machinery, plant and equipment of the Sullivan Company, and was not material that was used in the construction of the Lincoln High School Building; and the court erred in considering and allowing this as a proper counterclaim on behalf of the defendant.

Continuing the testimony (transcript of record, page 117). Witness, A. C. Sullivan. Questions by Mr. Thomas.

“Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

“A. We owe them \$26.80 for power, and \$26.10 for lights at the Lincoln High School.

“Q. Has that been paid?

“A. No. sir.”

Cross examination by Mr. Hunt (transcript of record, page 125):

“Q. Now, the Portland Light & Power Company has a bill of \$52.90 for light and power. What was that power furnished for?

“A. To drive the motor.

“Q. To drive the motor?

“A. Yes, sir.

“Q. What motor—the Hippeley motor?

“A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

"Q. And the light was what?

"A. Lights used around the place where we were working.

"Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it not?

"A. Yes, sir."

We again submit to the court that clearly the power bill and the light bill are not lienable items which could properly be chargeable against the Hicks Company and the surety bond, and, not being such, are not capable of being used as a counterclaim against the cause of action of the plaintiff; and that the reception, consideration and allowance thereof constituted an error by the trial court. It might as well be said that the Portland Railway, Light & Power Company would have a lien or claim for car fare against the surety bond for the furnishing of power and a street car to transport a laborer employed by Sullivan who was furnishing work to the new Lincoln High School. One is as logical as the other.

Continuing the testimony (transcrip of record, page 117). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of George B. Rate.

"A. We owe them \$13.75 for some plaster hair.

"Q. Plaster hair?

"A. Yes, sir.

"Q. Was that used at the Lincoln High School?

"A. Yes, sir. I think it was; as near as I can tell it was.

“Q. Has that been paid?

“A. No, sir.”

The plaster hair testified to above occupies the same relation as do the claims of the Acme Cement Plaster Company and the Atlas Mixed Mortar Company; for the hair entered into the construction of the blocks which were used, not only in the Lincoln High School, but also in the Smith Hotel, in contract jobs, and to furnish a stock on hand for the Sullivan Company. We submit that the rule of law and the decisions heretofore announced and cited control.

Continuing the testimony (transcript of record, page 117). Witness, A. C. Sullivan. Questions by Mr. Thomas.

Q. I call your attention to the claim of the Union “Oil Company.

“A. We are owing them \$78.25.

“Q. What was that for?

“A. That is for coal oil furnished at the Lincoln “High School.

“Q. How was it used?

“A. It was used as a sort of lubricant in knocking “out these cores.

“Q. Has that been paid?

“A. No, sir.”

We submit that the coal oil supplied by the claimant is not a lienable item and is not a charge that could be enforced against the Hicks Company or the surety bond; hence that the same was improperly allowed as an item of counterclaim in this suit.

Continuing the testimony (transcript of record, page 118). Witness, A. C. Sullivan. Questions by Mr. Thomas.

“Q. I call your attention to the claim of the Western Lime & Plaster Company.

“A. We owe them \$1285.91.

“Q. What was that for?

“A. For plaster.

“Q. Used at the Lincoln High School Building?

“A. Yes, sir.

“Q. Has that been paid for?

“A. No. sir.”

Under the testimony in this case hereinbefore cited, the plaster as supplied by this particular claimant, the Western Lime & Plaster Company, entered into the making of blocks not only for the new Lincoln High School, but also for the Smith Hotel job, other contract jobs, and for the furnishing of a stock on hand for the Sullivan Company, and was not a lienable item under the law of the state, and was not an item that could be successfully asserted against the Hicks Company or against the surety bond; hence it was an improper item of counterclaim.

Continuing the testimony (transcript of record, page 118). Witness, A. C. Sullivan. Questions by Mr. Thomas.

“Q. I call your attention to the claim of Wright & Branch.

“A. Wright & Branch—we owe them a balance of \$1400.00.

“Q. A balance of \$1400.00.

"A. Yes, sir.

"Q. For what?

"A. It is a balance due them on a sub-contract that "they took from us for erecting partitions.

"Q. In the Lincoln High School Building?

"A. In the Lincoln High School Building.

"Q. Has that been paid?

"A. No, sir.

We submit that the item just testified to is probably a lienable item under the mechanics' lien law of this state, but in the absence of the same being paid the trial court ought not to have considered it as a proper claim for damages. The Hicks Company contends that it was liable for this under its bond; but, as we have endeavored to urge upon this court, the bond was for indemnity against damage and not indemnity against liability; and there being no damage arising under this particular item, because of the non-payment thereof the same should not have been considered by the court.

Continuing the testimony (transcript of record, page 118). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of the United "States Steel Products Company.

"A. We owe a balance of \$150.00.

"Q. What was that for?

"A. That is for wiring—wire—reinforcing wire.

"Q. That is used in these blocks? A small wire?

"A. A small chicken wire.

"Q. Used as a reinforcement?

"A. Yes, sir.

“Q. That was used in these blocks used in the Lincoln High School?

“A. Yes, sir.

“Q. Has that been paid?

“A. No, sir.

The same comments heretofore made apply also to the above claim.

This comprises the testimony in reference to the claims of the various laborers and materialmen, and we hope that the court has been indulgent and patient in the setting forth of the same.

We believe that the trial court committed grievous error; and that, based on the rule of law and the citations of authorities hereinbefore announced and set forth, the allowance of such claims upon such evidence as has been here given was not only improper, but that the consideration of the same by the court constituted the basis of the trial court's judgment and was reversible error.

One of the grounds specified in assignment of error 5 for a motion for judgment on the pleadings and for a verdict and judgment on the pleadings and testimony as set forth in the first ground of said motion, is as follows:

“1. That the defense of estoppel as set forth
“in the plaintiff's reply was clearly established and

“that the defendant, Lewis A. Hicks Company, “was bound by the written assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank, and the acceptance thereof by the Lewis A. Hicks Company, dated the 18th day of December, 1911, and the written notification given by the said Lewis A. Hicks Company, based on the written assignment and acceptance, which said written notification was dated April 3, 1912, and that the “facts and matters set forth in the pleadings by the “defendant did not constitute a defense to the matter of estoppel pleaded by the plaintiff.”

It will be noted that the plaintiff in error, by its reply and in the further reply to the answer, beginning at page 22 of the transcript of record, alleges that the Sullivan Company, as sub-contractor, entered into a contract with the Hicks Company for the doing of certain work on the Lincoln High School. That in order to enable the Sullivan Company to perform its contract, it applied to Ladd & Tilton Bank for a loan, which Ladd & Tilton Bank refused to make unless security was given for the repayment thereof. Whereupon the Sullivan Company executed an assignment to Ladd & Tilton Bank of all moneys due or to become due under its contract with the Hicks Company, which assignment was duly filed with the Hicks Company and accepted by it, and upon the execution thereof and its acceptance by the Hicks Company, Ladd & Tilton Bank advanced to the Sullivan Company the sum of \$3500 (transcript of record, pages 75, 76 and 77). Thereafter, pursuant to said assignment, the Hicks Company paid all moneys which were earned by the Sullivan Company under its sub-

contract to Ladd & Tilton Bank; and Ladd & Tilton Bank, pursuant to agreement, endorsed the checks of the Hicks Company, without recourse, and turned the same over to the Sullivan Co. in order that it might have sufficient funds to carry on the work mentioned in its said sub-contract.

On or about the first day of April, 1912, Ladd & Tilton Bank made inquiries as to the repayment of its loan to the Sullivan Company; and upon the request of Ladd & Tilton Bank the Hicks Company furnished a statement to the Sullivan Company, dated April 3, 1912, which is as follows:

“April 3d, 1912.

Sullivan Fireproof Partition Co., City.,

Gentlemen: As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

Lewis A. Hicks Company,

FK:KT

By Fred A Katz.”

Upon receipt of this notification of April 3d, stating that the work of Sullivan under the sub-contract had been completed and that there was due on or about May first the balance of \$4300.00, and expressing the willingness of the Hicks Company to pay \$700 at the time of the execution of the notification, Ladd & Tilton Bank,

relying thereon and believing that the Sullivan Company had performed its contract according to its terms and believing that the balance was due it as set forth in the notification, released the \$700, leaving a net balance due under said contract of \$3600, the same being the amount of the indebtedness due Ladd & Tilton Bank from the Sullivan Company at that time.

Thereafter, and on or about May 1, 1912, when Ladd & Tilton Bank applied to the Hicks Company for the balance of the \$3600 the Hicks Company repudiated its action and agreement and refused to pay the money.

Plaintiff in error submits that the assignment of the funds by Sullivan Company to Ladd & Tilton Bank and the acceptance thereof by the Hicks Company, and the Hicks Company's letter of April 3, 1912, and the reliance placed thereon by Ladd & Tilton Bank, all to its subsequent injury, created an estoppel which would prevent the Hicks Company from asserting the defense made in its answer. We submit that where the course of action of one leads another to do a thing or perform an act which the other would not have done save in reliance on the statement of facts or things promised to be done, the one making the statement is estopped to set up a different existing state of facts, to the prejudice and harm of the one relying thereon. It will be noted from the evidence that the Ladd & Tilton Bank learned for the first time, about May 1, 1912, that the Sullivan Company had unpaid bills for labor and material in connection with its contract and that it had no such knowledge at the time of the execution of the notification by the Hicks Company dated April 3, 1912. On the con-

trary, the Hicks Company had direct knowledge long prior to the notification of April 3, 1912, wherein they make the definite statement of the payment of money to Ladd & Tilton Bank, that the Sullivan Company had unpaid bills for creditors and materialmen incurred on account of its sub-contract. See the testimony (transcript of record, page 98). Witness, A. C. Sullivan. Questions by Mr. Hunt.

“Q. You will please state whether or not you know “that the Lewis A. Hicks Company knew that you had “unpaid laborers and materialmen on account of the “work done by you under that sub-contract.

“A. Why, I don’t know whether or not they knew “of all the outstanding accounts we had, but I know “that they had received letters from some of them—several of our creditors telling them of the amounts that “were owing to them by us.

“Q. Those letters received from your creditors by the Lewis A. Hicks Company, and the notification of “the amounts due, did they constitute the sum of \$700.00 “which you spoke of just a few moments ago, or was it “in addition to the \$700?

“A. Well, the ones I have in mind are two outside “of the \$700.00. That \$700.00 was made up of several “invoices that I took down there and showed Mr. Katz “how I intended to disburse this \$700.00, and had a list “of the names and amounts.

“Q. Did you know what other accounts—you said “you had in mind two others who had filed claims beyond the \$700.00. Do you know who they were?

“A. Mr. Wagner of the Hicks Company had told “me that the Columbia Contract Company and the Atlas “Mixed Mortar Company had both written him, noti-

“fying him that we were back in our accounts with
“them.”

Transcript of record, page 132. Witness, A. C. Sullivan. Questions by Mr. Hunt.

“Q. Did the bank request that that notification
“dated April 3, 1912, be addressed to itself, or did it
“just simply say that a notification be given of a certain
“amount due and when it would be paid?

“A. I think that was the way the request was made;
“that a letter be written stating the amount due us, and
“when it would be paid.

“Q. Did Mr. Katz of the Hicks Company know
“that that letter was going to be delivered to Ladd &
“Tilton Bank?

“A. Yes, sir.

“Q. And did he know that it was upon the strength
“of that letter and the information therein contained that
“Ladd & Tilton Bank was going to release \$700.00?

“A. Yes, sir.

“Q. How many of these claims that you have tes-
“tified about did the Lewis A. Hicks Company, or any
“of its agents, know at the time of April 3, 1912—that
“you know they knew of?

“A. Well, at different times when I was in the
“office, Mr. Wagner or Mr. Katz would speak to me
“about having received letters from different people.
“Now, I remember distinctly him telling me that he had
“heard from the Columbia Contract Company and the
“Acme Mixed Mortar Company and one day gave me
“a letter or showed me a letter from Mr. Thomas of the
“School Board calling attention to an account that had
“been presented to them; it was one of the plaster ac-
“counts, I don’t remember whether the Western Lime
“& Plaster or the Acme Cement Plaster.

"Q. One of the big plaster contracts?

"A. Yes, sir.

"Q. Did you ever generally inform the Hicks Company prior to April 3, 1912, that you were in financial difficulties?

"A. Oh, no. Mr. Wagner and I spoke of it. I think he knew fairly well what condition we were in about that time."

Transcript of record, page 140. Witness, Mr. Katz. Questions by Mr. Hunt.

"Q. You say it was not your intention to make any binding obligation on the Hicks Company by writing that letter (notification of April 3, 1912). That is what you said, isn't it?

"A. Yes.

"Q. But you did state that the contract had been completed, didn't you?

"A. Yes, sir.

"Q. You knew that it was completed?

"A. Yes, sir.

"Q. And you said that there was a balance due of \$4300.00, didn't you?

"A. Yes, sir.

"Q. And you said it would be paid on or about May 1st?

"A. Yes, sir.

"Q. You made no reservation about liens, as you call it, or any other labor claim, did you?

"A. No.

* * * *

"Q. Did you know, Mr. Kratz, that Sullivan had other unpaid creditors—other than those represented in this \$700?

"A. Yes, sir.

"Q. At the time of this notification of April 3d?

"A. Yes, sir.

"Q. Did you know that they had priority and would have to be paid?

"A. Did I know what?

"Q. That they had priority and would have to be paid?

"A. Prior orders?

"Q. Priority. Didn't you know that they were first in the law and would have to be paid before anybody else—these other claimants?

"A. That was my impression.

"Q. Yes, you knew they had to be paid, and if they were paid as they had to be paid under the law, you knew that there wouldn't be \$4300.00 due, didn't you?

"A. There was \$4300.00 due at that time."

Transcript of record, page 150. Mr. Katz. Questions by Mr. Hunt.

"Q. Did you understand at that time, Mr. Katz (referring to the notification of April 3, 1912), that Hicks was going to have to pay any of these claimants under Sullivan? You knew Hicks would have to pay his own bills, but did you know that Hicks was going to have to pay any bills of Sullivan's?

"A. Sure.

"Q. You did. At that time you thought that?

"A. Yes."

Transcript of testimony, page 159. Witness, A. C. Sullivan. Questions by Mr. Hunt.

"Q. Mr. Sullivan, I wish you would make it clear whether or not you ever told Mr. Howard, prior to the first day of April, that you had indebtedness accruing on account of unpaid labor and material claims on the Lincoln High School and your contract with Hicks.

“A. No, sir. I don’t think I ever spoke to Mr. Howard about it at that time—previous to that time.

“Mr. Thomas: What date was that—April 1st?

“Mr. Hunt. April 3d, the date of the notice.

“A. That is I don’t think I ever directly called his attention to it or explained to him what we owed.

“Q. Was it your intention Mr. Howard should so understand you had other indebtedness, or did you intend he should be kept ignorant of that fact?

“A. I didn’t particularly mean he should be kept ignorant of it, but I wasn’t anxious that he should know at that time just how we were involved. Just as I didn’t—I didn’t go to him and let him know that we were or to what extent, but I didn’t use any means of not letting him know.

* * * *

“Q. You mean you didn’t wilfully conceal, but you just simply didn’t tell him the facts which he didn’t ask about.

“A. Yes, sir.

We submit to the court that the testimony could not show a more reprehensible state of facts on the part of the Hicks Company than is disclosed herein. The Hicks Company knew that Ladd & Tilton Bank had loaned money to the Sullivan Company with which it was to perform its sub-contract with the Hicks Company. On or about April 1st, the Hicks Company knew that the Sullivan Company had incurred large bills for labor and material which it had not been able to pay and probably could not pay, and knew at that time that the creditors of Sullivan on account of his sub-contract were pressing him; and a portion of the creditors had even gone to the extent of writing letters to the Hicks Company explain-

ing the condition. Yet, with knowledge of all the facts, the Hicks Company testified that, having such knowledge, on April 3, it notified Ladd & Tilton Bank that the contract had been completed and that there was due Sullivan \$4300.00, which would be paid on May first, of which amount the Hicks Company was willing to pay \$700 on that date provided Ladd & Tilton Bank would release it to the Sullivan Company; and the Ladd & Tilton Bank, in good faith, acted upon this notice, and, facts being concealed from it, which would have changed its course and conduct, released the \$700 and awaited the final payment which the Hicks Company promised to make. We submit to this court that the Hicks Company wilfully and fraudulently made statements to Ladd & Tilton Bank which it knew to be untrue, and Ladd & Tilton Bank believed the same and, relying upon the truthfulness thereof, released said \$700, which, under the law, it could have applied upon its own indebtedness. And the Hicks Company having thus misled Ladd & Tilton Bank for its own secret profit and gain and to the loss of Ladd & Tilton Bank, later attempted to assert a statement of facts which, if true, would tend to defeat the right of Ladd & Tilton Bank for the balance of the contract price. We submit to the court that such conduct on the part of the Hicks Company is not only inexcusable, but that it discloses facts which show its intention to wilfully mislead and defraud Ladd & Tilton Bank; and that its success in such fraud and wilful misrepresentation ought not to be a defense by it to the action at bar.

From Federal Case No. 14099, 24 Federal Cases, we quote the following portion of an opinion rendered by the Circuit Court of the United States for the Northern District of Ohio:

“It is a principle of law of universal application (and as just as it is general) that admissions whether of law or of fact which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. And the principle is founded upon grounds of public policy that a man shall not be permitted to repudiate his own representations. It was forcibly said by Justice Campbell in regard to the validity of this identical guaranty, that ‘a corporation quite as much as an individual is held to a careful adherence to truth in their dealings with mankind and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced.’”

In the case of *Kirk v. Hamilton*, 102 U. S. Sup. Ct. 68, Justice Harlan said:

“We are of the opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. ‘What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration,’ became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell*

“v. Van Rensselaer, 1 Johns. (N. Y.) Ch. 344:
 ““There is no principle better established, in this
 “court, nor one founded on more solid considera-
 “tions of equity and public utility, than that which
 “declares, that if one man, knowingly, though he
 “does it passively, by looking on, suffers another to
 “purchase and expend money on land, under an
 “erroneous opinion of title, without making known
 “his own claim, shall not afterwards be permitted
 “to exercise his legal right against such person. It
 “would be an act of fraud and injustice, and his
 “conscience is bound by this equitable estoppel.’
 “While this doctrine originated in courts of equity
 “it has been applied in cases arising in courts of
 “law.”

We would refer the court to the sound statement which has been affirmed and reaffirmed in the case of *Dickerson v. Colgrove*, 100 U. S. Reports, 578, where Justice Swayne said:

“The estoppel here relied upon is known as an
 “equitable estoppel, or estoppel *in pais*. The law
 “upon the subject is well settled. The vital prin-
 “ciple is that he who by his language or conduct
 “leads another to do what he would not otherwise
 “have done, shall not subject such person to loss
 “or injury by disappointing the expectations upon
 “which he acted. Such a change of position is
 “sternly forbidden. It involves fraud and false-
 “hood, and the law abhors both. This remedy is
 “always so applied as to promote the end of justice.
 “It accomplishes that which ought to be done be-
 “tween man and man and is not permitted to go
 “beyond this limit.”

In the case of *Mizner v. Kussell*, 20 Mich. 229, the following language was used by Justice Campbell, Justices Cooley and Christiancy concurring:

“No one can evade the force of the impression
 “which he knows another received from his words
 “and conduct, and which he meant him to receive,
 “by resorting to the literal meaning of his language
 “alone. Every one is responsible for the belief he
 “intentionally creates, whether by words or other-
 “wise, and will be precluded from profiting by any
 “unconscionable use of an obligation which has been
 “thus wrongfully obtained.”

Without quoting further cases at length, we cite to the court the following:

Conway National Bank v. Pease, 82 Atl. (N. H.) 1068.

Seymour v. Oelrichs, 106 Pac. (Calif.) 88.

Swain v. Seamens, 9 Wallace (U. S.), 254, at p. 274.

Jones v. Subera, 126 N. W. 253.

Jaques v. Esler, 4 N. J. Eq. 461.

Carruthers v. Whitney, 105 Pac. (Wash.) 831.

Note “d,” 134 Am. St. Rep. p. 177, and some 30 or 40 cases cited thereunder, sustaining the same principle.

We submit to the court that under the evidence aforesaid and by virtue of the acts and deeds of the Hicks Company which were untruths and known to be untruths at the time made, and the application of the principles of law as above enunciated, the estoppel was clearly shown and the court erred in not so finding and

sustaining the motion for a verdict and judgment on the pleadings and evidence.

One other point remains to be briefly referred to under the assignments being discussed.

We wish to submit to the court the fact that the different parties who have furnished material to the Sullivan Company to be used in performing its contract with the Hicks Company are not such materialmen as are contemplated by Section 6266, Lord's Oregon Laws (conceding that it is controlling in the case, for the purpose of this argument only) or the general lien laws of the State of Oregon; and, further, that such materialmen did not furnish materials which were to be used in the construction of the new Lincoln High School so as to bring them within the purview of the law or of the surety bond.

It is to be noted from the contract and evidence that the Sullivan Fireproof Partition Co. agreed to sell and furnish to the Hicks Company certain fireproof partition tile, and that the manufacture of the fireproof partition tile by the Sullivan Company is under a secret process and formula and is a result of the combination of numerous materials. It is further shown that, in the manufacture of the fireproof partition tile, sand was essential, lime was essential, plaster was essential, hair was essential, wood cores were essential, coal oil was es-

sential, and probably chemicals. It was the combination of all these articles that produced a fireproof partition tile, which was the commodity that the Sullivan Company sold to the Hicks Company and agreed to place in the building. The combination of all the elements above mentioned, when manufactured under the secret process of the Sullivan Company, constituted an entirely new manufactured product. We submit to the court that the materials thus furnished to the Sullivan Company were not so furnished relying upon the fact that each element was to go into the new Lincoln High School, but were furnished upon the credit of the manufacturer, the Sullivan Fireproof Partition Co.

If the claims allowed by the court as a counterclaim in this case are upheld, then we submit that it is going to be most difficult to draw the distinguishing line between materialmen who have liens and those who have not; and if the ruling is sustained, it will mean that a man furnishing material to an independent manufacturer who manufactures a new product, which product is placed in a building, would have a right to lien the building therefor. We submit that this is entirely contrary to the lien law, not only of the State of Oregon, but elsewhere, and contrary to the letter and spirit of the surety bond executed by Hicks.

To illustrate our meaning, we will suppose that one had a contract to manufacture a new and useful lock for the new Lincoln High School building, of which that particular person was the originator and patentee, having the sole right to manufacture it; and that the locks require a certain amount of steel and a certain

amount of brass. The manufacturer goes to A and purchases steel, also to B and purchases brass, and combines the two with other materials under a secret formula into an article known as an improved lock. Can it be successfully contended that A, the seller of the steel, and B, the seller of the brass, would have the right to lien the Lincoln High School, if it were a lienable building, for the materials supplied to the manufacturer who made a new product therefrom, or the right to claim under a surety bond such as Hicks gave in this case? If not, then we submit to the court that the plaster-man, the sand-man and the hair-man can have no lien against the new Lincoln High School and cannot claim under Hicks' surety bond. If the rule adopted by the trial court is correct, we confess we do not see the end; for if X sells the steel to A, knowing that A is going to sell to the manufacturer of locks, and that the lock is going to enter into the construction of a particular building, then X would also have the right to follow his material for lien purposes.

In support of the rule for which we contend, we desire to refer the court to Jones on Liens, 2d Edition, section 1326, where it is said:

“Materials must be furnished with special reference to their use in a particular building in order to secure the protection of a mechanics’ lien law. In an Ohio case *Storer, J.*, said: ‘The contractor who agrees to paint a building may purchase the constituent parts of the materials he uses of different persons; one may have furnished the oil, the other the pigment, but when all are combined, there certainly ought not to be a lien in

“behalf of each vendor. The brick-maker may have
 “been supplied with the clay from which he has
 “manufactured his brick by one party, and another
 “have furnished the fuel to burn the kiln, but it
 “cannot be said a right exists for both to be en-
 “forced under the statute. And so with the iron-
 “monger; he may sell the raw material to the foun-
 “der and the machinist, but when it is worked up,
 “whether it is changed from pig-iron into the bloom,
 “or from the bloom into the bar, or from the bar
 “into the steam engine or the sugar-mill, the right
 “to follow it through all these changes ought not
 “to be permitted else no vendee would ever acquire
 “title to the manufactured article.”

Also Jones on Liens, 2d Ed., section 1330:

“There can be no lien for materials furnished
 “solely on the credit of the person ordering them,
 “though they be afterwards used in the construction
 “of the building upon which a lien is claimed.

“A lien for materials is so far from depending
 “upon their use in a building that, if they are used
 “in its construction without having been furnished
 “for it, no lien upon it arises for such materials.

“It is a question for the jury whether materials
 “were furnished on personal credit or on the credit
 “of the building. Upon this question any relative
 “evidence is admissible.”

Also, in support of the rule, see 59 Ga. 653.

We submit to the court, without further argument,
 that materialmen furnishing material to an independent
 manufacturer to be milled or manufactured by him into
 a distinct and new article, and the new article itself sup-

plying the building, have no lien because thereof, and that the materialmen in the case at bar would have no lien for their materials under the lien law of the state or for action against the surety bond of Hicks.

ASSIGNMENT OF ERROR VI.

The following finding of the court is assigned as error:

“Under the bond of Hicks & Company to the School District it and its surety became liable for the payment of labor and material furnished to sub-contractors and which were used in the construction of the building, and to an action in the name of the state for the use and benefit of the labor and material claimants (Sec. 6266 L. O. L. Hill v. American Surety Co. 200 U. S. 197; Smith v. Mosier, 169, Fed. 430). The order and assignment from the Sullivan Company to the plaintiff was subject and subordinate to the terms of the contract between it and the defendant and their respective rights and liabilities thereunder. The plaintiff, therefore, knew or was chargeable with knowledge at the time it accepted the order and assignment and made advances thereunder, that Hicks & Company was liable for the payment of claims for labor and material furnished the Sullivan Company in the performance of its contract.”

The court found that the surety bond given by Hicks Company, with the Pacific Coast Casualty Company as surety, was pursuant to section 6266 of L. O. L., and that the defendant Hicks and his surety became liable on the bond for the unpaid materialmen and la-

borers of the sub-contractor Sullivan. We have heretofore set forth in this brief that it is alleged in the answer of the defendant Hicks that the bond was executed pursuant to section 6266 of L. O. L., which allegation was denied by the plaintiff in its reply, thus making a clear issue, but that no evidence was offered or received to show that said bond was executed pursuant to section 6266 of L. O. L.; and therefore the finding of the court on the same is unsupported by any evidence at all, and such finding is error.

We refer to our former argument in support of this assignment.

ASSIGNMENT OF ERROR VII.

This assignment of error relates to the finding of the court, which is as follows:

“The contention is made on behalf of the plaintiff (1) that Hicks & Company cannot assert as a defense to this action its liability for unpaid labor and material furnished the Sullivan Company until it has paid and discharged them. And (2) that its liability under its bond is for such claims only as could be made the basis of a mechanics’ lien if such lien could be filed against a public building.

“I am unable to concur in the first position and it is unnecessary to consider the other, for, without detailing the evidence, it clearly shows that the unpaid material and labor claims for which liens could have been filed amount in the aggregate to more than the sum now claimed by the plaintiff. The statute (Sec. 6266) in pursuance of which Hicks & Company’s bond was given provides that

“any person furnishing labor or supplying material
 “for the construction of the building specified in
 “the contract and bond, may, when payment for the
 “same has not been made, have a right of action
 “and is authorized to bring suit in the name of the
 “state for his use and benefit against the contractor
 “and surety and to prosecute the same to final judg-
 “ment and execution. Hicks & Company and its
 “surety were therefore personally liable for unpaid
 “labor and material claims of the Sullivan Com-
 “pany. The fact that such claims are still unpaid
 “would be a good defense to an action by the Sul-
 “livan Company to recover on its contract, and the
 “plaintiff stands in the place and stead of the lat-
 “ter, it is a proper defense to this action.”

The argument relative to this assignment of error is heretofore more completely given in this brief.

We contend that the unpaid laborers and materialmen were not competent as a defense on the part of Hicks, owing to the fact that the contract between the sub-contractor, Sullivan, and Hicks, and the contract between Hicks and School District No. 1, together with the surety bond therefor, was a contract to indemnify against damage and not to indemnify against liability, and that therefore such unliquidated claims as were set up in this case were not properly received and the court committed error in considering the same. And further the court stated in its finding: “Without detailing the
 “evidence, it clearly shows that the unpaid material and
 “labor claims for which *liens could have been filed*
 “amount in the aggregate to more than the sum now
 “claimed by the plaintiff.” We have endeavored to

demonstrate to the court in this brief that a great proportion, if not all, of the claims of laborers and materialmen were such claims as could not be made *the subject of a mechanics' lien*, and therefore they were not properly offset or counterclaimed against the plaintiff's demand.

ASSIGNMENT OF ERROR VIII.

Error is further assigned to the trial court in making the following finding:

"The principal contention of the plaintiff is that
 "the defendant is estopped by its letter of April 3,
 "1912, from now asserting that there is not due and
 "owing from it to the Sullivan Company the
 "amount stated therein less the \$700.00. Assuming
 "but not deciding that the letter amounted to a dec-
 "laration by Hicks & Company that the sum of
 "\$4300.00 was then due and payable to the Sullivan
 "Company and that such sum would be paid the
 "plaintiff in any event, and not a mere declaration
 "that there was such a balance unpaid on the con-
 "tract with the Sullivan Company, and assuming
 "further that the plaintiff so understood it and re-
 "lied thereon, there is no room for an application of
 "the doctrine of estoppel because the undisputed
 "facts show that the plaintiff was not thereby misled
 "to its injury. It was no doubt lulled into inaction
 "and in reliance thereon took no steps at the time
 "to enforce its claim against the Sullivan Company,
 "but the undisputed evidence is that the Sullivan
 "Company was in no worse position financially in
 "May, when the defendant refused to make the pay-
 "ment than it was when the letter was written. The
 "theory of an estoppel *in pais* is that one who by

"his acts or conduct has misled another to believe
 "a given state of fact to be true and to act thereon,
 "shall not be permitted to assert the contrary to the
 "injury of the person so acting. The important con-
 "dition of the right to assert such estoppel is the
 "fact in addition to all others that the party plead-
 "ing it must show that the attempted repudiation
 "will work him injury by causing him to suffer a
 "loss of some substantial character or that he was
 "thereby induced to alter his position for the worse
 "in some material respect (16 Cyc, 744; Dickerson
 "v. Colgrove, 100 U. S. 578). Plaintiff was in no
 "way injured by its delay in proceeding against
 "the Sullivan Company, but its remedy against that
 "company was as full and complete in May, when
 "the defendant refused payment, as it was when
 "the letter of April 3rd was written. It was not in-
 "jured on account of the \$700.00 payment because
 "it was made to pay claims which could have been
 "asserted against it by the defendant, and more-
 "over, it could not rightfully have applied such pay-
 "ment to its own account because it was made on
 "the express understanding of all parties that it
 "was to go to the discharge of labor and material
 "claims."

This assignment of error relates to the defense of
 estoppel raised by the plaintiff in error. This also has
 been discussed at length in this brief, and we submit that
 the pleadings and the evidence clearly demonstrate that
 Hicks, with knowledge of the unpaid claims of Sullivan,
 definitely stated to Ladd & Tilton Bank that \$4300 was
 due and would be paid on May first, and that, acting in
 reliance upon such statement, Ladd & Tilton Bank re-
 leased \$700 and made no effort to collect the remainder

of its indebtedness until after the Sullivan Company became bankrupt. We submit to the court that the pleadings and evidence created an estoppel on the part of Hicks and that such ought to have been the finding of the court.

ASSIGNMENT OF ERROR IX.

This assignment of error is as follows:

“That the United States District Court for the District of Oregon erred in rendering judgment that the plaintiff take nothing by its complaint and that the same be dismissed, and erred in rendering judgment against the plaintiff for costs, and erred in rendering judgment in favor of the defendant and against the plaintiff.”

We submit to the court that the argument in the foregoing brief clearly demonstrates the error of the trial court.

In conclusion, we desire to call the attention of the court to the importance of this case and the issues presented therein; for if a bank is unable to assist a contractor by loaning money to him and taking an assignment of the funds which he is to earn under that contract, then the business of construction is seriously handicapped and builders and contractors will be great losers thereby. Further, if the court finds that the surety bond in this case was given pursuant to section 6266 of L. O. L. (in which view at this time we do not concur), then such bonds are of greater efficacy and value than are the mechanics' lien laws of the state, a

difference which we do not believe was in the mind of the Legislature when the section was enacted.

Based upon the foregoing assignments of error and the arguments given thereunder, and the citation of authorities and the principles announced therein, we submit to the court that the United States District Court for the District of Oregon committed error and that the judgment thereof should be reversed.

Respectfully submitted.

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